

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 21-CR-265(PKC)

-against-

: United States Courthouse
: Brooklyn, New York

: June 13, 2023
: 9:00 a.m.

MICHAEL McMAHON, ZHENG
CONGYING, and YONG ZHU, also
known as "Jason Zhu,"

Defendants.

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TRANSCRIPT OF CRIMINAL CAUSE FOR JURY TRIAL
BEFORE THE HONORABLE PAMELA K. CHEN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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1 A P P E A R A N C E S (continued):

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12

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14

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19 Proceedings recorded by computerized stenography. Transcript
20 produced by Computer-aided Transcription.

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Proceedings

1740

1 (In open court; jury enters.)

2 THE COURT: So, Government, do you have anything to
3 tell us this morning?

4 MR. HEEREN: Only one minor housekeeping thing, your
5 Honor.

6 THE COURT: Yes.

7 MR. HEEREN: 506G, I don't think the Court formally
8 said it had been admitted, though the Court did permit us to
9 play it. So, for the sake of the record, I just want to
10 clarify that it's the Government's understanding that 506G was
11 admitted following a sidebar yesterday.

12 THE COURT: That appears to be correct, so
13 Government Exhibit 506G is formally admitted.

14 (Government Exhibit 506G so marked.)

15 THE COURT: Also, the Government should move to have
16 mark the Rule 15 deposition transcript because, otherwise,
17 it's not going to be anywhere in the record. So, obviously,
18 given that the deposition was taken with both sides having the
19 opportunity to participate in that, I am going to admit a
20 transcript of that.

21 So, have you marked that?

22 MR. HEEREN: We have not marked it yet. We have a
23 redacted or will have a redacted transcript that matches what
24 was played in the court and we will put that into evidence.

25 THE COURT: So, why don't we give it a number?

Proceedings

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1 Can you just do that now and we'll admit it on the
2 record before you close?

3 MR. HEEREN: Sure. One second, your Honor.

4 (Pause in proceedings.)

5 MR. HEEREN: Your Honor, we're going to identify
6 that transcript as Government Exhibit 713 and we move to admit
7 it now to the extent necessary.

8 THE COURT: So, the transcript of the Rule 15
9 deposition of -- what was her name again?

10 MR. HEEREN: Xinzi Xu. That's X-I-N-Z-I X-U.

11 THE COURT: Also known as Sabrina, correct?

12 MR. HEEREN: Yes, your Honor.

13 THE COURT: So, that is admitted.

14 (Government Exhibit 713 so marked.)

15 THE COURT: With that?

16 MR. HEEREN: With that, your Honor, the Government
17 rests.

18 THE COURT: Thank you very much, Mr. Heeren.

19 Mr. Lustberg?

20 MR. LUSTBERG: Thank you, your Honor. I'm going to
21 go get our witness.

22 THE COURT: Please.

23 Just to remind the jury again, the defense is not
24 required to put on any evidence whatsoever but they can choose
25 to do so. And Mr. Lustberg apparently is going to call some

Proceedings

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1 witnesses on behalf of Mr. McMahon and perhaps the other
2 Defendants as well.

3 But the bottom line is -- I'll instruct you during
4 the charges -- any party can make use of any other party's
5 evidence. In other words, no one owns the evidence. All
6 parties can make use of whatever evidence they think supports
7 their contentions.

8 And you're calling, Mr. Lustberg?

9 MR. LUSTBERG: Thank you. Mr. McMahon calls Liping
10 Shi.

11 THE COURT: If you'll approach the witness box and
12 remain standing for a moment so we can swear you in.

13 (Witness sworn.)

14 THE COURTROOM DEPUTY: Please state and spell your
15 name for the record.

16 THE WITNESS: Liping Shi, L-I-P-I-N-G S-H-I.

17 THE COURT: Thank you.

18 You may inquire, Mr. Lustberg.

19 MR. LUSTBERG: Thank very much, your Honor.

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Shi - Direct - Lustberg

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1 **LIPING SHI,**

2 called by the Defense, having been

3 first duly sworn, was examined and testified

4 as follows:

5 DIRECT EXAMINATION

6 BY MR. LUSTBERG:

7 Q Ms. Shi, how are you employed?

8 A I'm self-employed.

9 Q And what do you do?

10 A As a lawyer.

11 THE COURTROOM DEPUTY: Pull the microphone towards
12 you.

13 THE COURT: You can move the microphone, just make
14 sure you speak directly into it. The seat does not move
15 though, so be careful.

16 Q Yes, speak nice and loudly so everybody can hear. Thank
17 you.

18 What type of law do you practice?

19 A Mostly immigration and I also do matrimonial and business
20 or real estate transactions. Mostly immigration.

21 Q Do you do any criminal defense law or any kind of
22 criminal law?

23 A Occasionally.

24 Q Do you sometimes go to court?

25 A Yes, I do.

Shi - Direct - Lustberg

1744

1 Q So, directing your attention to the summer of 2016 -- I
2 know that was a while ago -- do you recall someone named Zhu
3 Yong or Jason Zhu coming to see you?

4 A Based on my record, yes.

5 Q Mr. Zhu did not retain you; is that correct?

6 A Did not.

7 Q But before we get to that, what was it that he asked you
8 to do?

9 A He asked me to locate a private investigator.

10 Q And did that private investigator have to be in any
11 particular place?

12 A Licensed in New Jersey.

13 Q And did he tell you why he needed a private investigator
14 licensed in New Jersey?

15 A He needs to locate someone in order to collect debt.

16 Q Okay.

17 A Not for him, for his friend or someone else.

18 Q So, what did you do when he made that request?

19 A Actually, I did not know any private investigator at that
20 time, so I reached out to a criminal attorney that I met in
21 Kings County Criminal Court previously. I had his business
22 card. So, I reached out to him to ask him whether he happened
23 to know anybody that is New Jersey licensed private
24 investigator.

25 Q And did he provide a name to you?

Shi - Direct - Lustberg

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1 A Yes.

2 Q Do you recall what that name was?

3 A Michael McMahon.

4 Q And did you then -- did you know Mr. McMahon?

5 A I did not know him personally. I never met him. I just
6 reached out to him.

7 Q And the only -- am I right that your testimony is that
8 you reached out to him just because he was a name of a private
9 investigator that you were given in New Jersey?

10 A Yes.

11 Q Were you trying to find someone who -- withdrawn.

12 Do you have any idea about what the case was that
13 Mr. Zhu was coming to talk to you about other than that it was
14 a collection of a debt?

15 A My impression is that. I do not remember exactly how he
16 said it, but my impression is that.

17 Because in my matrimonial cases, sometimes the
18 defendant, the whereabouts is unknown so we need to locate
19 them. That's how I, you know, believed that he needs to
20 locate someone in order to serve papers down the road.

21 Q Did you have any knowledge one way or the other as to
22 whether this case involved the Chinese Government?

23 A No.

24 Q I asked you this earlier, but I think you testified that
25 Mr. Zhu did not end up retaining you; is that right?

Shi - Direct - Tung

1746

1 A Correct.

2 Q What ended up happening?

3 A Actually, I sent a retainer agreement, but he didn't sign
4 or somebody else didn't sign.

5 Q And did you ever hear from him again?

6 A No.

7 MR. LUSTBERG: Thank you very much.

8 I have nothing further for the witness.

9 THE COURT: You may want to clarify, just because
10 I'm looking at the transcript, Zhu, do you know how to spell
11 that?

12 THE WITNESS: Z-H-U.

13 THE COURT: Thank you very much.

14 MR. LUSTBERG: Thank you, your Honor.

15 THE WITNESS: Thank you.

16 THE COURT: Mr. Tung?

17 MR. TUNG: Yes.

18 DIRECT EXAMINATION

19 BY MR. TUNG:

20 Q Ms. Shi, my name is Kevin Tung. I'm the attorney for
21 Yong Zhu in this case.

22 A Good morning, Mr. Tung.

23 Q Good morning.

24 Continuing the questioning earlier with attorney
25 Lustberg, Ms. Shi, when Mr. Yong Zhu came to your office, did

Shi - Direct - Tung

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1 he ask for a consultation, legal consultation, for what he was
2 doing?

3 A Not specifically. He asked for information.

4 Q But he came to your office because you were an attorney,
5 right, back in 2016, right?

6 A Correct.

7 Q So, you had a conversation with him, right, regarding
8 what he would like you to do, correct?

9 A Correct.

10 THE COURT: Mr. Tung, I think this is your witness,
11 so this is direct examination, right?

12 MR. TUNG: That's correct, yes.

13 THE COURT: So, just don't lead her.

14 MR. TUNG: Yes, your Honor.

15 Q You just stated that you did prepare a retainer
16 agreement; is that right?

17 A Correct.

18 Q And I'm going to show you an e-mail that was -- I'm going
19 to just show you an e-mail now.

20 THE COURT: He wants to use the Elmo, Fida.

21 Just for the witness. You can only show it to the
22 witness.

23 MR. TUNG: Okay. Can we show the witness the
24 e-mail?

25 THE WITNESS: Yes, I can see it.

Shi - Direct - Tung

1748

1 Q Do you recognize, is this e-mail that was prepared by
2 you?

3 A Yes, correct.

4 Q And also I'll show you the attachment, those other
5 retainer agreements, okay?

6 A Okay.

7 MS. CHEN: Just for the record, has this been
8 premarked with an exhibit letter?

9 THE COURT: Good question.

10 MR. TUNG: They have been premarked with Bates
11 number Yong Zhu --

12 THE COURT: No, let's have a sidebar.
13

14 (Continued on the following page.)
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Sidebar

1749

1 (The following occurred at sidebar.)

2 THE COURT: You should mark it with a defense
3 exhibit letter because the defendants use letters. So, you
4 can make it Defendant Zhu A.

5 MR. TUNG: Okay.

6 THE COURT: We'll mark it as such.

7 Secondly, I notice that the first e-mail is all in
8 Chinese. So, I don't want you submitting a foreign language
9 document in for the content of it if you're not going to
10 provide a translation.

11 MR. TUNG: Well, your Honor, this e-mail, that's
12 actually the cover letter, as I stated before. I'm not going
13 to be asking any questions on the cover letter.

14 But the attachment was attached to e-mail, so that's
15 why it's complete document. If you want me --

16 THE COURT: But you're offering it for what it says,
17 which is that it purports to be an e-mail from her to Mr. Zhu
18 that says something, but it's all in Chinese and I don't want
19 that admitted without some translation.

20 MR. TUNG: That's fine. Then I'm just going to
21 admit the retainer agreement.

22 THE COURT: That's fine. You can show her that and
23 ask if that's the retainer agreement she sent.

24 Does the Government have objection to just the
25 unexecuted retainer agreement being admitted?

Sidebar

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1 It's simply proof that corroborates her testimony
2 that she sent him retainer agreement.

3 MS. CHEN: Your Honor, we actually don't have an
4 objection to the full record coming in with the e-mail. I
5 understand that -- our position is that is the complete
6 document and that without such there's not really context as
7 to what the retainer agreement is and that is important.

8 THE COURT: But the e-mail, though, doesn't give it
9 in context because it's in Chinese.

10 MS. CHEN: Understood.

11 But, for example, the "from" and "to" is important
12 as to whether or not it's Ms. Shi's and whether Mr. -- or what
13 she understood to be Mr. Zhu's e-mail address.

14 THE COURT: Does it have a date in alpha or Roman
15 whatever -- Arabic numbers?

16 MS. CHEN: Yes, there are Arabic numbers there as
17 well, your Honor.

18 So, we would not object to the full record coming
19 in. Obviously, we cannot use the only-Chinese portion of it
20 for its content.

21 THE COURT: No one can argue about what the contents
22 are in Chinese.

23 MR. TUNG: Right.

24 THE COURT: Go ahead since the Government doesn't
25 object.

Sidebar

1751

1 MR. TUNG: So, it's on stip, right, so I can publish
2 now?

3 THE COURT: No. Just establish through her the
4 normal way one would with a witness what it is and why it's
5 admissible.

6 MR. TUNG: Okay.

7 MR. LUSTBERG: I was just going to volunteer to
8 provide Mr. Tung with some exhibit stickers because the
9 Government often doesn't have defense exhibit stickers.

10 THE COURT: We do sometimes, but I think you
11 preserve good will with Ms. Gonzalez if you give the exhibit
12 sticker.

13 MR. LUSTBERG: That's all I want to do.

14 THE COURT: Me too.

15 MR. TUNG: Defendant's A.

16 THE COURT: Defendant Zhu A.

17

18 (Continued on the following page.)

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Shi - Direct - Tung

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1 (Sidebar ends; in open court.)

2 THE COURT: The exhibit will be marked. It's
3 Defendant Zhu Exhibit A and it consists of an e-mail and then
4 an attachment.

5 So you can proceed now, Mr. Tung.

6 MR. TUNG: Thank you your Honor.

7 Q Ms. Shi, I'm showing you a document that has been
8 premarked as Defendant Zhu Exhibit A.

9 A Yes.

10 Q Can you see that that's the e-mail that you prepared --

11 THE COURT: Well, what is it?

12 That's the question, what is it?

13 Q What is it?

14 Do you recognize this document?

15 A Yes. That was sent by me to Mr. Zhu August 24, 2016.

16 THE WITNESS: Should I --

17 THE COURT: No, that's okay.

18 It's an e-mail you sent; is that right?

19 THE WITNESS: Yes.

20 THE COURT: Next question?

21 Q And I also show you the attachment to this e-mail.

22 Do you recognize this document?

23 A Yes.

24 Q Is this a document prepared by you?

25 A Correct.

Shi - Direct - Tung

1753

1 THE COURT: Did you send it with the e-mail?

2 THE WITNESS: Yes, as attachment.

3 THE COURT: Go ahead.

4 Q And this is second page to that attachment.

5 Do you recognize this document?

6 A Yes.

7 Q And those signature lines are blank; right, it was
8 unsigned?

9 A Correct.

10 Q But the document was prepared by yourself, right?

11 A Correct.

12 Q And I'm also showing you another attachment to the
13 e-mail.

14 Do you recognize this document?

15 A Yes.

16 Q And this is the -- what is it?

17 A It is the retainer agreement also. I believe that was
18 prepared by the private investigator.

19 Q Private investigator --

20 THE COURT: Let's go back, Mr. Tung.

21 Did you also send that with the e-mail?

22 THE WITNESS: Correct, with the e-mail.

23 THE COURT: Do you want to move to admit them?

24 MR. TUNG: Yes, and there's a second page.

25 THE COURT: That's okay. That way, you can show it

Shi - Direct - Tung

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1 to the jury while you ask questions.

2 MR. TUNG: Your Honor, I'd like to move Defendant
3 Zhu Exhibit A into evidence.

4 MS. CHEN: No objection.

5 MS. WONG: No objection.

6 MR. GOLDBERGER: No objection.

7 THE COURT: It's admitted as Zhu Exhibit A.

8 (Defendant Zhu Exhibit A so marked.)

9 Q Ms. Shi, showing you the first page which is attachment
10 to the e-mail, and it's the attorney-client fee agreement.

11 As you testified earlier, that was prepared by you,
12 right?

13 A Correct.

14 Q And can you look at the section -- it's kind of a little
15 bolded here, scope of service?

16 A Yes.

17 Q Do you want me to read this or you can read?

18 Because it's hard for you to read, I can read this.

19 A Okay.

20 Q The scope of service to be provided by you to Yong Zhu
21 is --

22 THE COURT: Mr. Tung, move the microphone towards
23 you.

24 Q The scope of services to be provided by you to Mr. Yong
25 Zhu was to act -- acting as client's family counsel in

Shi - Direct - Tung

1755

1 assisting client to handle the matter involving a licensed
2 private investigator in locating a male subject, whose name is
3 blank, including the subject's whereabouts, photo or video.

4 Is this what you wrote for the service you are going
5 to provide to Mr. Yong Zhu?

6 A Correct.

7 Q And at any time when you had the conversation with
8 Mr. Yong Zhu, did you ask Mr. Yong Zhu if the service
9 requested by him was from any government?

10 A No.

11 Q Did you suspect at the time when you met with Mr. Yong
12 Zhu what he was requesting the service that was pertaining to
13 some request for other government?

14 A No.

15 Q And did Mr. Yong Zhu tell you the work that he's asking
16 you to assist that was from the order of Chinese government?

17 A No.

18 MR. TUNG: I have no further questions.

19 THE COURT: Thank you very much, Mr. Tung.

20 Any questions from you, Mr. Goldberger or Ms. Wong?

21 MR. GOLDBERGER: No, your Honor.

22 THE COURT: Government, cross-examination?

23 MS. CHEN: Yes, your Honor.

24

25

Shi - Cross - Chen

1756

1 CROSS-EXAMINATION

2 BY MS. CHEN:

3 Q Good morning, Ms. Shi.

4 A Good morning.

5 Q Other than -- I think we ran into each other in the
6 bathroom.

7 Other than that, have we met before?

8 A No.

9 Q I want to talk a little bit about your background. I
10 believe you testified that you're a lawyer.

11 A Yes.

12 Q How long have you been a lawyer for?

13 A Since 2003.

14 Q And --

15 A In New York, in U.S. I was attorney in China as well.

16 Q And I think you said your practice is mostly immigration;
17 is that right?

18 A Correct.

19 Q Also some criminal defense work?

20 A Sometimes. Immigrants, you know, relating to law
21 enforcement.

22 Q I understand.

23 And do you speak any other languages, other than
24 English?

25 A Mandarin.

Shi - Cross - Chen

1757

1 Q Any other dialects of Chinese?

2 A Mandarin, just Mandarin. But I can understand Hunanese,
3 Cantonese, but I don't speak those dialects.

4 Q I understand.

5 Do you also read Chinese?

6 A Yes.

7 Q Are you familiar with traditional or simplified Chinese?

8 A I could read both, but mostly I write simplified Chinese.

9 Q Understood.

10 And when you communicated with Zhu Yong, in what
11 language did you communicate?

12 A Mandarin.

13 Q Just to go back, when you were an attorney in China, what
14 kind of work did you do there?

15 A I'm working for a law firm. That law firm basically does
16 some corporate work.

17 Q That's different than what you do in the United States;
18 is that right?

19 A Totally different.

20 Q Totally different. Okay. And I just want to make sure I
21 understand how you communicated with Zhu Yong.

22 Did you communicate via phone, phone calls?

23 A I believe we communicated with phone calls, yes.

24 Q And obviously I know we just looked at one, but did you
25 also communicate via e-mail?

Shi - Cross - Chen

1758

1 A That's just, yeah, that e-mail. I didn't get response
2 from him.

3 Q Did you communicate via WeChat at all?

4 A No at that point, no.

5 Q At some other point did you communicate via WeChat?

6 A I don't have his WeChat account.

7 Q Do you use WeChat as part of your attorney services?

8 A For now, yes.

9 Q You do?

10 A Uh-huh.

11 Q Do you have an understanding as to what a "QQ" e-mail
12 account would be?

13 A QQ e-mail is like regular e-mail, I believe. I never had
14 that kind, but some of my clients do have qq.com as their
15 e-mail accounts.

16 Q Are those clients based in the U.S. or somewhere else?

17 A They could be both.

18 Q Could be both. Got it.

19 Just to confirm, is your e-mail address
20 liping@shilawoffices.com?

21 A Yes.

22 Q And you have that e-mail now and did you have it back
23 then, in 2016?

24 A Both, yes.

25 Q I believe you testified on direct examination that you

Shi - Cross - Chen

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1 had gotten Michael McMahon's name; is that right?

2 A Correct.

3 Q And did you get that from a lawyer you met in a criminal
4 court?

5 A Correct.

6 Q I think you also mentioned you had an impression as to
7 what the case was about; is that right?

8 A Correct.

9 Q Did you ever meet anybody else for whom Zhu Yong was
10 asking on their behalf?

11 A No.

12 Q Did you ever learn any information about anyone who Zhu
13 Yong was acting on behalf for?

14 A No, what do you mean learn information?

15 Q Did you learn anything about someone who was working with
16 Zhu Yong, for example.

17 A No.

18 Q I think you also mentioned there was something about
19 serving papers.

20 Did you see any papers in connection?

21 A No.

22 Q No. Okay.

23 Can I show you what has been marked and admitted as
24 Defendant Zhu Exhibit A, I believe?

25 THE COURTROOM DEPUTY: You're showing this?

Shi - Cross - Chen

1760

1 MS. CHEN: On our computer, please. Thank you.

2 (Exhibit published to the jury.)

3 Q Ms. Shi, can you see that on the screen?

4 A Yes.

5 Q So, do you see where there's kind of a line -- I'm going
6 to mark it right here -- kind of a quarter of the page down;
7 do you see that? Right here?

8 A That's original e-mail.

9 Q Right. Just under that, do you see where it says Shi Law
10 Office?

11 A Yes.

12 Q And just to confirm, that's your e-mail?

13 A Yes, that's my e-mail.

14 Q zyzy996@sina.com, is that an e-mail you understood
15 Mr. Zhu had access to?

16 A Yeah.

17 Q Do you remember if you and Zhu Yong spoke about obtaining
18 travel records for an individual he was looking for?

19 A That's actually -- I believe that's the suggestion from
20 the private investigator as to how to locate someone based on
21 his experience, to start with --

22 Q Okay.

23 A -- the records.

24 Q Okay.

25 MS. CHEN: If we could go to page two of this

Shi - Cross - Chen

1761

1 exhibit.

2 Q And I think you testified, Ms. Shi, that you sent this
3 retainer agreement.

4 Did you ever receive a signed copy of this retainer
5 agreement?

6 A Never.

7 Q Did Zhu Yong contact you about this matter after you sent
8 this retainer agreement?

9 A I believe we discussed about how the fee is going to be,
10 yeah.

11 Q But did he ultimately engage you as a lawyer for this?

12 A No.

13 Q So, is it fair to say that after -- if we look at the top
14 here, I think it's dated August 23, 2016 -- after August of
15 2016, you weren't really involved in this matter at all?

16 A No.

17 Q Okay.

18 MS. CHEN: If we could go back to the first page.

19 If we could zoom in to the top, please.

20 Q Do you see the @qq.com that's written here?

21 A Yes.

22 Q Is that one of the QQ accounts that we were just talking
23 about?

24 A Yes.

25 Q Just a QQ account, not that you necessarily know anything

Shi - Cross - Chen

1762

1 about this, right?

2 A Right.

3 Q Can you read the numbers leading up to the @qq.com?

4 A 19960165.

5 Q And is there a date associated with this?

6 A Underneath the line, that's September 14, 2016.

7 MS. CHEN: May I publish side-by-side what's been
8 admitted as Government Exhibit 431K, please?

9 THE COURT: You may.

10 (Exhibit published to the jury.)

11 MS. CHEN: If you could go to page three.

12 If we could blow up where it says "application
13 data."

14 Q Do you see an e-mail listed in the bottom right-hand
15 corner of this culled out box?

16 A Yes.

17 Q Can you read that for me, please?

18 A 19960165@qq.com.

19 Q And is this the same e-mail address that you had just
20 read from Defendant Zhu's Exhibit A?

21 A Correct.

22 MS. CHEN: If we could go to the first page now of
23 Exhibit 431K. Blow up just the upper left portion.

24 Q Do you see where it says "surname" and "given name"?

25 A Surname is "Sun" given name is "Hui."

Shi - Redirect - Lustberg

1763

1 MS. CHEN: Your Honor, may I have one moment?

2 THE COURT: Yes.

3 (Pause in proceedings.)

4 Q Just one more thing, Ms. Shi?

5 MS. CHEN: If we could go to page three of 431K
6 again.

7 (Exhibit published to the jury.)

8 MS. CHEN: And again, if we could go to application
9 data.

10 Q Do you see where it says "occupation and employer"?

11 I just marked it.

12 A Occupation, Government. Employer, Wuhan Public Security
13 Bureau, Caidian branch.

14 Q Is Caidain spelled C-A-I-D-I-A-N?

15 A Yes.

16 MS. CHEN: No further questions your Honor.

17 THE COURT: Thank you.

18 Any redirect?

19 MR. LUSTBERG: Briefly.

20 REDIRECT EXAMINATION

21 BY MR. LUSTBERG:

22 Q Ms. Shi, you mentioned on cross-examination that you
23 thought that there had been a suggestion from the private
24 investigator to get travel records?

25 A Yes.

Shi - Redirect - Lustberg

1764

1 Q But you never had any conversation with the private
2 investigator, right?

3 A Either I texted him or called him. I don't think I ever
4 e-mailed him.

5 Q So, you think you may have texted or called the private
6 investigator, Mr. McMahon?

7 A Because I need to tell him what's the potential client
8 need.

9 Q And, so, your recollection is that you may have had some
10 communication with him and you told --

11 What were the client needs that you mentioned to
12 him?

13 A Just to locate a particular person but the whereabouts is
14 unknown and need to, you know, locate that person, probably
15 with proof of photos or video. Yeah, that's it.

16 Q Again, you never had any e-mail communications with him?

17 A I don't think so. I actually searched, but I couldn't
18 find any.

19 MR. LUSTBERG: Thank you. Thank you for coming
20 today. I appreciate it.

21 THE WITNESS: Can I add something?

22 THE COURT: Does it relate to a question that he
23 just asked?

24 The only thing is you should only need to add
25 something if you need to correct testimony. But you don't

Shi - Redirect - Tung

1765

1 need to over up additional information.

2 Is there anything that you need to correct about
3 what you said?

4 THE WITNESS: No.

5 THE COURT: So, then, hold that thought.

6 Someone can ask a question if they feel like it.

7 MR. LUSTBERG: I have no further questions.

8 Thank you, Ms. Shi.

9 THE WITNESS: Thank you so much.

10 THE COURT: Mr. Tung?

11 MR. TUNG: Yes.

12 THE COURT: Redirect.

13 REDIRECT EXAMINATION

14 BY MR. TUNG:

15 Q Ms. Shi, you just shown with a picture of a person by the
16 name Hui Sun?

17 A Correct.

18 Q Do you know that person at any time?

19 A No, never heard of him.

20 Q And I'm going to just show you the e-mail.

21 (Exhibit published to the jury.)

22 Q You see this was e-mail that this was an e-mail that was
23 forwarded to an e-mail address, which the Government just
24 asked you to read. And the Government pointed out to that
25 person's e-mail is actually Hui Sun's e-mail.

Shi - Redirect - Tung

1766

1 Now my question to you is back in August of 2016,
2 did anyone tell you who Hui Sun is?

3 A No.

4 Q You also testified earlier that you know that it was not
5 actually Mr. Yong Zhu asking you to locate person, it was
6 somebody, maybe a friend or somebody else, is asking Yong Zhu
7 to ask you to help him locate a person; is that correct?

8 MS. CHEN: Objection.

9 THE COURT: Overruled.

10 Was it your understanding that someone was asking
11 Mr. Zhu to locate someone?

12 THE WITNESS: Correct. The ultimate decision not
13 his.

14 THE COURT: Go ahead.

15 Q According to this e-mail, it should be natural for
16 Mr. Yong Zhu to forward what you provided, retainer agreement,
17 proposed retainer agreement, to his contact, correct?

18 THE COURT: Sustained, sustained.

19 MR. TUNG: Thank you. I have no further questions.

20 Thank you very much, Ms. Shi.

21 THE WITNESS: Thank you.

22 THE COURT: Recross?

23 MS. CHEN: No, your Honor.

24 THE COURT: Thank you very much, Ms. Shi. You're
25 free to go.

Brickfield - Direct - Lustberg

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1 THE WITNESS: Thank you so much.

2 (Witness excused.)

3 MR. LUSTBERG: I'll get our next witness.

4 THE COURT: Do you want to say who that is?

5 MR. LUSTBERG: Yes. His name is Paul Brickfield.

6 THE COURT: If you'll come up to the witness box and
7 remain standing for one moment so we can swear you in.

8 (Witness sworn.)

9 THE COURTROOM DEPUTY: Please state and spell your
10 name for the record.

11 THE WITNESS: It's Paul Brickfield P-A-U-L
12 B-R-I-C-K-F-I-E-L-D.

13 **PAUL BRICKFIELD,**

14 called by the Defense, having been

15 first duly sworn, was examined and testified

16 as follows:

17 DIRECT EXAMINATION

18 BY MR. LUSTBERG:

19 Q Good morning, Mr. Brickfield.

20 A Good morning.

21 Q How are you employed, sir?

22 A I'm an attorney.

23 Q And are you in private practice or government practice or
24 what?

25 A I was in government for nine years. I was an Assistant

Brickfield - Direct - Lustberg

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1 U.S. Attorney from '84 to '90. I was a first assistant county
2 prosecutor in Bergen County, New Jersey, from '90 to '93.
3 From 1993 to the present, I'm a private criminal defense
4 attorney.

5 THE COURT: So you know that you have to speak
6 slowly and clearly.

7 THE WITNESS: No problem. In New Jersey, we speak
8 quicker.

9 THE COURT: Not here, though. We're in a no
10 speeding zone.

11 THE WITNESS: No problem.

12 THE COURT: Go head.

13 Q How do you know Michael McMahon?

14 A I met Michael maybe around 2005, 2007, through another
15 criminal defense attorney named Brian Neary, who introduced me
16 as a very good private investigator.

17 Q Have you used Mr. McMahon as a private investigator
18 yourself?

19 A Yes.

20 Q On about how many occasions?

21 A Well, from 2005 until 2019 or so, I used him a lot.

22 Q So, I want to direct your attention to a time period in
23 about August of 2016.

24 Do you remember receiving a call or a communication
25 from someone asking you for a recommendation for a private

Brickfield - Direct - Lustberg

1769

1 investigator licensed in New Jersey?

2 A I received a text.

3 Q What was the text and what did you do?

4 A The text was from David Levine, who is a criminal defense
5 attorney right on Court Street across from the courthouse. I
6 had gotten to know him over 10, 15 years, and he would send
7 work to me in New Jersey and I would send work to him in New
8 York.

9 In this text, he asked me for a private investigator
10 in the Short Hills area of New Jersey.

11 Q Did he tell you anything about what the case was about?

12 A He said: Private investigator. Short Hills, New Jersey.

13 Q What happened?

14 A I gave him Mike McMahon's name and contact information.

15 Q And why did you do that?

16 A Mike is good and I thought maybe it could be a piece of
17 work for him.

18 Q Did you have any idea that the case that he was being
19 referred into had anything to do with China?

20 A No.

21 Q Do you have any other insight at all into what the
22 recommendation he was asking you for, what it was about?

23 A All it said was private investigator and what was -- did
24 I know what the approximate hourly rate was.

25 Q And did you?

Brickfield - Cross - Bonomo

1770

1 A I said \$100. That's what I was paying him.

2 MR. LUSTBERG: Thank you, Mr. Brickfield.

3 I have nothing further of the witness, your Honor.

4 THE COURT: All right.

5 Mr. Tung or Mr. Goldberger?

6 MR. GOLDBERGER: No, your Honor.

7 MR. TUNG: No, your Honor.

8 THE COURT: Government, cross-examination?

9 CROSS-EXAMINATION

10 BY MS. BONOMO:

11 Q Good morning, Mr. Brickfield.

12 A Good morning.

13 Q I believe you testified on direct that you had previously
14 hired Michael McMahon to work for you.

15 A Yes.

16 Q In all the times that you worked with Michael McMahon,
17 did you ever pay him \$5,000 in cash at a Panera Bread?

18 A No.

19 Q If I also understood your testimony correctly, in
20 August 2016 you were asked by someone named David Levine to
21 provide Michael McMahon's contact information.

22 A I was asked to provide for a private investigator.

23 Q And then you understood that David Levine intended to
24 pass that information along to another third party; is that
25 correct?

Brickfield - Cross - Bonomo

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1 A I don't know. I don't think it was for himself.
2 Somebody had asked him, I think, yes, I think that's correct.

3 Q So, you had no involvement in that particular matter
4 beyond that; is that correct?

5 A That was it.

6 MS. BONOMO: No further questions.

7 THE COURT: Thank you, Ms. Bonomo.

8 Any redirect?

9 MR. LUSTBERG: No, your Honor.

10 THE COURT: Thank you very much. You may step down.
11 Probably took you longer to get here than that.

12 THE WITNESS: It did. Left at 6:30.

13 Bye, everybody.

14 (Witness excused.)

15 THE COURT: Mr. Lustberg, do you have another
16 witness?

17 MR. LUSTBERG: Yes. His name is Eric Gallowitz.
18 I'll go get him.

19 THE COURT: Please come up to the witness box and
20 remain standing for a moment so we can swear you in.

21 (Witness sworn.)

22 THE COURTROOM DEPUTY: Please state and spell your
23 name for the record.

24 THE COURT: Get close to the microphone and project.

25 THE WITNESS: Eric Gallowitz.

Gallowitz - Direct - Lustberg

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1 THE COURT: You may inquire, Mr. Lustberg.

2 MR. LUSTBERG: Thank you, your Honor.

3 **ERIC GALLOWITZ,**

4 called by the Defense, having been

5 first duly sworn, was examined and testified

6 as follows:

7 DIRECT EXAMINATION

8 BY MR. LUSTBERG:

9 Q Mr. Gallowitz, my name is Larry Lustberg, and I represent
10 Mike McMahon in this matter.

11 We've never met, correct?

12 A Correct.

13 Q The first time we've ever seen each other was just a
14 couple seconds ago when I saw you and asked you to come into
15 the courtroom, right?

16 A That's correct.

17 Q Sir, how are you currently employed?

18 A I work for a compliance company and I still own my own
19 private investigative firm.

20 Q How do you know Michael McMahon?

21 A I met him in the mid 1990s while we were both working in
22 the NYPD in the narcotics division.

23 Q So, that leads me to go back a little bit. If you could,
24 just tell the court and the jury your experience at the New
25 York Police Department.

Gallowitz - Direct - Lustberg

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1 A Twenty-year veteran of the NYPD. I was a detective, I
2 was a 9/11 first responder, and retired in 2007.

3 Q Have you been a private investigator since 2007?

4 A Yes.

5 Q What's the name of your private investigative firm?

6 A Stuyvesant Investigative Group.

7 Q If you would, could you describe your relationship with
8 Michael McMahon?

9 A First, it started out as co-workers. And then he moved
10 on from the narcotics division; I stayed. I didn't see him
11 for many years. I heard that he got injured in an accident
12 and had to retire, and I still didn't see him for many years.
13 And then I retired and then eventually found out that he was a
14 private investigator, and that's kind of when we hooked up
15 again.

16 Q And when you say "hooked up again," in what context did
17 you hook up again.

18 A At first just talking, friendly. And then a substantial
19 amount of time went by after that and then we wound up doing
20 some cases together. He worked for me, I worked for him, that
21 type of thing.

22 Q Is that common for private investigators, to work with
23 one another on cases?

24 A Yes.

25 Q And why is that?

Gallowitz - Direct - Lustberg

1774

1 A Because certain cases you need more than one
2 investigator. And, you know, if you're not a big company, you
3 need to find other investigators.

4 Q Before today -- you see Mr. McMahon here today, don't
5 you?

6 A I do.

7 Q Before today, have you seen him since his arrest?

8 A No.

9 Q Have you spoken to him since his arrest?

10 A No.

11 Q You said that you worked on some cases with him as a
12 private investigator.

13 What types of activities did you engage in with him
14 on the cases that you worked with before the case that we're
15 going to talk about beginning in 2016?

16 A Some surveillance. Maybe once we did interviews. Not
17 many times, a few times.

18 Q In addition to the surveillance that you did, was that
19 surveillance covert or overt?

20 A Covert.

21 Q And just if you could explain to the jury, what do you
22 mean when you say -- and I used the word, but what does
23 "covert" mean?

24 A You can perform a surveillance without the person, the
25 subject, knowing that you're looking at them.

Gallowitz - Direct - Lustberg

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1 Q Were there times when there's overt surveillance?

2 A There could be, yes.

3 Q Have you ever done that?

4 A I don't recall.

5 Q Is there anything else as a private investigator that you
6 do other than surveillance or that you have done with
7 Mr. McMahon other than surveillance?

8 A Database checks, background-type stuff.

9 Q And when you say "database checks," how do you do
10 database checks, Mr. Gallowitz?

11 A Well, there are proprietary databases that exist that you
12 have to either be law enforcement or a private investigator or
13 some other type of professional to gain access to these
14 databases.

15

16 (Continued on the following page.)

17

18

19

20

21

22

23

24

25

Gallowitz - Direct/Mr. Lustberg

1776

1 EXAMINATION BY

2 MR. LUSTBERG:

3 (Continuing.)

4 Q So do you recall being contacted --

5 Directing your attention to the time period around

6 October 2016 and I understand it's a while ago.

7 Do you recall being contacted by Mr. McMahon with
8 regard to working with him on an investigation at that time?

9 A I don't recall exactly when he contacted me, no.

10 Q Okay. But do you recall -- whenever it was -- being
11 contacted to work on a matter with him that involved
12 surveillance in New Jersey?

13 A Yes.

14 Q Okay. Do you know what the purpose of that
15 investigation was?

16 A You know, surveillance in general is to locate somebody
17 so that's what the purpose was.

18 Q Okay. Did Mr. McMahon share with you anything further
19 about the purpose of this investigation other than that it
20 was -- the purpose was to locate somebody?

21 A I recall that at some point he informed me that there
22 was an Interpol warrant for an individual that he was hired
23 to look for.

24 Q Okay. And let me --

25 And do you recall when he told you that, and if you can

Gallowitz - Direct/Mr. Lustberg

1777

1 you don't I can refresh your recollection, your responses
2 would "wow."

3 Do you remember that?

4 A No.

5 Q So this is, my awesome colleague here is going to show
6 you what's in evidence as Government Exhibit 4019-B, Page 1.

7 THE COURT: So just for the witness. Let me tell
8 you, sir, that you should just read it to yourself and the
9 question will be: Does it refresh your memory?

10 MR. LUSTBERG: This document is in evidence, your
11 Honor.

12 THE COURT: I'm sorry. Go ahead. My apologies.
13 Sorry about that.

14 Couldn't Ms. Conti do it from the table? It just
15 seemed a little crowded up there.

16 MR. LUSTBERG: The reason is because...

17 THE COURT: That's okay, you don't have to tell
18 me. Just go ahead.

19 MR. LUSTBERG: I think you probably know.

20 EXAMINATION BY

21 MR. LUSTBERG:

22 (Continuing.)

23 Q So -- see if you can blow that up --

24 So an e-mail from Mr. McMahon to you that says, "TLO
25 says he wanted by Interpol. Wow."

Gallowitz - Direct/Mr. Lustberg

1778

1 First of all what's TL0, Mr. Gallowitz?

2 A That's one of the proprietary databases that I spoke
3 of.

4 Q Okay. Why was your response wow?

5 A Atypical of private investigators doing that type of
6 work.

7 Q And, did it give you concern that there was something
8 wrong with doing the surveillance that you were doing?

9 A No.

10 Q Why not?

11 A Just to my recollection, we're just trying to locate
12 the person.

13 Q Okay. Do you know --

14 Do you recall that Mr. McMahon also showed you a wanted
15 poster with that person's -- with the person on it?

16 A I don't recall exactly, no.

17 Q Let me show that to you. That's the same exhibit which
18 is in evidence. Exhibit 4019-B at Pages 3 and 4. And
19 Ms. Conte will pull that up because I'm not able to do that
20 myself.

21 So you can just blow that up a little bit more.

22 This is an e-mail from Mr. McMahon to you, can you see
23 it? I'm going to blow up that little picture.

24 A I see it.

25 Q If you could now go to the next page. Sorry, the

Gallowitz - Direct/Mr. Lustberg

1779

1 computer is a little slow. Sorry, we're working on it.

2 Apologize for the delay. There we go. Okay.

3 Do you recall seeing this wanted poster, Mr. Gallowitz,
4 at that time?

5 A Now that I look at this, yes, it refreshes my memory.

6 Q When you saw that there was an Interpol warrant and
7 that, in this wanted poster, did you have any
8 concern -- well, did it cross your mind that you might be
9 working for the People's Republic of China?

10 A Absolutely not.

11 Q By the way, had you ever done any investigations before
12 where the subject of the investigation was wanted by some
13 law enforcement somewhere?

14 A I don't recall.

15 Q Have you ever heard of Operation Sky Net?

16 A No.

17 Q Have you ever heard of Operation Fox Hunt?

18 A No.

19 Q Okay. I want to show you, this is Page 2, the next. I
20 want to show you another...

21 Okay. This is an e-mail from Mr. McMahon to you that's
22 in evidence that's Government Exhibit 4019-B, Page 2. And
23 following the e-mail regarding the Interpol warrant,
24 Mr. McMahon says to you, "Bring your gun."

25 Do you remember receiving that?

Gallowitz - Direct/Mr. Lustberg

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1 A I do now.

2 Q So does this refresh your recollection, then, that
3 Mr. McMahon said, "Bring your gun"?

4 A Yes.

5 Q Okay. If we could go to the next page. I want to ask
6 you what you meant by your response and I apologize again
7 for the delays here, it's just a little slow.

8 Your response, Mr. Gallowitz, was, "You bring your gun.
9 That's a given with me SCU hero."

10 So I want to understand what you meant by that. First
11 of all, what does "SCU" refer to?

12 A N.Y.P.D. Street Crime Unit.

13 Q Okay. And when you say, "You bring your gun. That's a
14 given with me SCU hero," what did you mean?

15 A I was making a joke. The reality is, I always carry my
16 gun when I'm working and I was making a joke.

17 Q What was the joke?

18 A The joke was you carry your gun, don't worry about me.

19 Q What's the reference to "SCU hero"?

20 A I know Mike McMahon to be a highly decorated police
21 officer, detective sergeant from the N.Y.P.D., and I know he
22 had some heroic moments in the Street Crime Unit.

23 Q If we could go to the next one. There's one more
24 question about this series of e-mails.

25 So Mr. McMahon says, "LOL."

Gallowitz - Direct/Mr. Lustberg

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1 Next one. And you say, "Combat pay," with four
2 exclamation points.

3 What did you mean by that?

4 A I was making another joke. I knew Mike would never --
5 Mike McMahon would never pay me anything extra, so I was
6 making a joke about combat pay when he said I should bring
7 my gun.

8 Q Okay. I want to show you -- this is what we're
9 marking? Okay.

10 So what has been premarked as Defense Exhibit BBB
11 which, for the Government, is Exhibit 4019 Pages 34 to 42.

12 THE COURT: So why don't we make it McMahon
13 Exhibit BBB.

14 MR. LUSTBERG: Thank you, your Honor.

15 (McMahon Exhibit BBB was marked for
16 identification.)

17 Show this just to the witness and counsel, please.

18 Q This is an e-mail from E. Gallowitz at
19 Stuyvesantinvestigative.com.

20 That's you?

21 A Yes.

22 Q To Mr. McMahon dated October 15, 2016. If we could go
23 to the attachment.

24 THE COURT: Mr. Lustberg, you should ask the
25 witness if he knows.

Gallowitz - Direct/Mr. Lustberg

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1 Do you remember this document?

2 MR. LUSTBERG: I want to show him the real
3 document that's the attachment.

4 THE COURT: I want to avoid having you testify
5 about the document.

6 MR. LUSTBERG: Right.

7 Q So now, I'm showing you the attachment. Do you
8 recognize this document?

9 A I recognize it as a document from Skip Smasher which is
10 another proprietary database.

11 THE COURT: Did you say that Skip Smasher?

12 THE WITNESS: Skip Smasher, which is a proprietary
13 database.

14 Q Okay. And what kind of data is available on
15 Skip Smasher?

16 A Used primarily to locate people.

17 Q Okay. And do you remember -- do you remember doing
18 a -- let me ask you this way.

19 Do you remember doing a -- performing a Skip Smasher
20 query or any work on Skip Smasher with regard to the matter
21 that you and Mr. McMahon were working on at that time?

22 A It's possible but I don't have an independent
23 recollection of it, no.

24 Q So leaving aside independent recollection. When you
25 look at this document, and you can flip through it if you

Gallowitz - Direct/Mr. Lustberg

1783

1 want, we share different pages.

2 My question is: Does that refresh your recollection
3 that you did a skipsmasher.com Super Trace Report at that
4 time?

5 A If there are more pages, I would like to see them.

6 Q Sure.

7 A Continue. Wait. Hold on. Back up.

8 THE COURT: You have very good eyesight.

9 THE WITNESS: It's blurry even with my glasses on.
10 Can you push that up a little? I can see the
11 bottom of it.

12 Q Is it a little better now? Okay. Sure.

13 A Next page. You can keep going. I'll ask you to stop
14 if there is any reason but is there more?

15 Q That was the Skip Smasher report.

16 A So repeat the question.

17 Q The question was: Do you recall looking at this and,
18 in particular, looking at the e-mail, the cover e-mail to
19 Mr. McMahon that it was attached to.

20 Does that refresh your recollection as to your doing a
21 Skip Smasher report back in 2016?

22 THE COURT: I'm going to sustain it to form. The
23 simply question is? Does looking at what's displayed in
24 front of you without new characterization of what is it is
25 by the defense, okay, I'm saying that to the jury mostly

Gallowitz - Direct/Mr. Lustberg

1784

1 disregard the question.

2 Looking at what's been shown to you, does that
3 refresh your memory about whether you ran a Skip Smasher
4 inquiry in connection with your work with Mr. McMahon?

5 THE WITNESS: It's very possible that I did, but
6 from seven years ago I can't tell you I remember running it,
7 no.

8 Q Let me ask you about another one.

9 Do you remember doing a search on something called
10 NJ Parcels, I'm sorry, njparcels.com?

11 A No, I do not recall that.

12 Q Okay. Let me show you a document and see if it
13 refreshes your recollection.

14 COURTROOM DEPUTY: What's that marked as?

15 MR. LUSTBERG: It would be marked as defendant
16 McMahon Exhibit CCC.

17 We can, if you need us to, zoom if we can.

18 This is partially redacted as you can see.

19 Q Do you need us to zoom in on this?

20 A No. Your question is?

21 Q Does this refresh your recollection that you depend a
22 search of njparcel.com?

23 A No, it does not.

24 Q Do you recall that database?

25 A I do not.

Gallowitz - Direct/Mr. Lustberg

1785

1 Q Okay.

2 A My guess would be that's an open source database.

3 Q What does that mean, open source?

4 A That anybody can run it.

5 Q So going back to October 2016, do you recall doing
6 surveillance of a location in Short Hills, New Jersey with
7 Mr. McMahon?

8 A I recall doing surveillance with Mr. McMahon.

9 Q In October 2016?

10 A Yes.

11 Q Do you remember anything about it?

12 A Not specifically, no.

13 Q Okay. Let me ask you this.

14 Do you have any recollection of either you or
15 Mr. McMahon calling the local police to inform them that you
16 were doing surveillance at that time?

17 A I recall Mr. McMahon calling me on my cell phone while
18 we were doing surveillance to ask me for my vehicle type and
19 plate number so he could let the local police know that we
20 were present in the area conducting a surveillance.

21 Q Okay. And that's something that you specifically
22 recall?

23 A I do, yes.

24 Q Okay. Do you remember doing during the surveillance in
25 2016 whether you actually saw the subject that you were

Gallowitz - Direct/Mr. Lustberg

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1 seeking to surveil?

2 A To my recollection, we didn't see anybody.

3 Q Okay.

4 A To my recollection.

5 Q Thank you.

6 Now, we're going to skip ahead. And directing your
7 attention to the following year, in April 2017, do you
8 recall doing additional surveillance with Mr. McMahon at
9 that time?

10 A Yes.

11 Q And do you remember how many days you worked with him
12 at that time?

13 A I believe it was two.

14 Q Okay. So I assume you don't remember the specific
15 dates?

16 A No.

17 Q Okay. I'm going to just see if I can refresh your
18 recollection with a document that's in evidence which is
19 Government Exhibit 3095.

20 MR. LUSTBERG: And, your Honor, since this is in
21 evidence I think we can -- I would like to ask him a few
22 questions about it.

23 THE COURT: Go ahead.

24 MR. LUSTBERG: Okay. Thank you.

25 Q Can you see that, Mr. Gallowitz, on your screen there?

Gallowitz - Direct/Mr. Lustberg

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1 A I can.

2 Q Do you recognize that document?

3 A I do.

4 Q What is it?

5 A That's an invoice from my company to Mr. McMahon's
6 company.

7 Q And let me just ask about that.

8 So when you did this surveillance with Mr. McMahon, he
9 would pay you -- he would pay you, correct?

10 A His company would pay me, yes.

11 Q Right. As opposed to his client, whoever that was,
12 paying you, right?

13 A Correct.

14 Q Okay. So looking at this, does it refresh your
15 recollection that the dates, the two dates, that you worked
16 with Mr. McMahon were April 5, 2017, and April 10, 2017?

17 A Yes.

18 Q Okay. Do you recall during that surveillance whether
19 you, you or Mr. McMahon, called the local police?

20 A I do not recall.

21 Q Okay. Let me show you a document to try to refresh
22 your recollection?

23 THE COURT: Just for the witness?

24 MR. LUSTBERG: Yes, just for the witness. We'll
25 mark this McMahon Exhibit DDD for identification.

Gallowitz - Direct/Mr. Lustberg

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1 THE COURT: Does the Government have a copy?

2 MR. LUSTBERG: These are all part of -- this is
3 all part of government --

4 THE COURT: I want to make sure they know what
5 you're showing to the witness.

6 MR. LUSTBERG: For the record, it was Government
7 Exhibit 4019-B, Pages 25 to 28. I'm sorry.

8 This is our mistake. This actually is in evidence
9 so we can show it.

10 THE COURT: All right.

11 MR. HEEREN: Can you just give the exhibit and
12 page number again?

13 MR. LUSTBERG: Of course. Government
14 Exhibit 4019-B, Pages 25 to 28.

15 THE COURT: He was just shown that a few minutes
16 ago.

17 So everyone agrees that that page of that exhibit
18 is in evidence, correct? Because I know part of that was
19 shown a minute ago. It's a series of messages, I gather.

20 MR. HEEREN: Just for the sake of clarity, yes,
21 that is in evidence.

22 THE COURT: Go ahead. You can publish that.

23 Q So this is an e-mail I believe it's from you to
24 Mr. McMahon saying, "Call local P.D., let them know we're
25 out there."

Gallowitz - Direct/Mr. Lustberg

1789

1 Do you see that?

2 A Yes.

3 Q Let me read it better.

4 "Call local P.D., let them know we are out there."

5 And go to the next page.

6 Mr. McMahon says, "Yes, for sure." He asks again for
7 plate number and vehicle type.

8 And that plate number and vehicle type does that
9 describe your vehicle, sir, at that time?

10 A At that time and currently, yes.

11 Q Does that refresh your recollection that the second
12 time around, and just for the record, the dates on that is
13 4/4/2017, you said that you did surveillance with
14 Mr. McMahon on 4/5/2017 is that your recollection that there
15 was discussion about making sure local law enforcement would
16 be called?

17 A Yes.

18 Q Was the surveillance that you did on those days in
19 April of 2017 overt or covert?

20 A To my recollection, covert.

21 Q Okay. Let me show you what's in evidence as Government
22 Exhibit 4019-B, Pages 36 to 39.

23 This is an e-mail on April 5, 2017, when you testified
24 you were doing surveillance with Mr. McMahon in which
25 Mr. McMahon tells you that car his friend is driving keeps

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1 driving by.

2 Do you have a recollection of that exchange?

3 A Not really, no.

4 Q Okay. So you don't know what you understood that to
5 mean at that time?

6 A No.

7 Q Okay. Go to the next one. This is an e-mail from you
8 to Mr. McMahon saying, "Dump."

9 Go to the next one.

10 Mr. McMahon says, "Ass."

11 And you say, "Dumb."

12 Do you have any recollection -- does that refresh your
13 recollection at all as to that exchange?

14 A I vaguely recall it now looking at this but I don't
15 recall the actual incident.

16 Q Okay. So do you know what you meant by dump and then
17 dumbass?

18 A Bad spelling, first of all. And then I corrected
19 myself. I mean, just in general, from doing surveillance in
20 general, you know, you don't want anybody else out there
21 that doesn't need to be out there.

22 Q What do you mean by that?

23 A You know, if I'm hired to do a surveillance, I don't
24 want to deal with anybody else either interfering with that
25 surveillance or anything like that.

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1 Q Or doing their own surveillance?

2 A Essentially.

3 MR. HEEREN: Objection, your Honor.

4 THE COURT: Overruled.

5 THE WITNESS: Potentially.

6 Q Okay. I want to go to -- actually, let's go to the
7 next page.

8 This is an e-mail from you to Mr. McMahon saying you
9 trust them?

10 Do you remember asking him that?

11 A This refreshes my memory.

12 Q What did you -- what were you asking there?

13 A If he trusted his client.

14 Q Okay. And his response is?

15 A He says no.

16 Q Okay. And your response to that is?

17 A I responded: "Me either."

18 Q Why was that?

19 A There was a lot of, you know, something was atypical
20 here with the whole Interpol warrant. That was in October
21 of '16 and now we're in April of '17 which just the whole
22 thing is atypical.

23 Q Okay. Did you think we're talking about not trusting
24 them? Did it cross your mind that you were doing work for
25 the People's Republic --

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1 THE COURT: Sustained.

2 MR. LUSTBERG: Your Honor, I'm asking him for
3 state of mind.

4 THE COURT: Let's have a quick sidebar.

5 (Continued on the next page.)
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Sidebar

1793

1 (Sidebar held outside the presence of the jury.)

2 THE COURT: My issue is more so leading. You're
3 treating him not as a direct witness. He said he thought it
4 was atypical you can ask him how but you want him to
5 specifically address whether he ever suspected they were
6 working for the Chinese government.

7 MR. LUSTBERG: Your Honor, respectfully, I don't
8 think that's leading at all. He can answer that no. I'm
9 not trying to get him to -- I'm certainly not trying to lead
10 him to say yes. I'm not saying: Is it correct? I'm asking
11 him what it is, you know, I mean, that's atypical. It's not
12 just that helpful to anybody.

13 I want to understand what it is, as far as the
14 relevance to this case, I would note the Government has -- I
15 get that the Court can do its own objections -- but, to me,
16 the question of whether when he said "atypical," that meant
17 that he thought they're -- I can ask it that way. Atypical
18 that you thought you were working for the Chinese
19 government.

20 THE COURT: How about: How did you think it was
21 atypical? Remember he's your witness.

22 MR. LUSTBERG: I understand. I'm not.

23 THE COURT: Let me do this. Ask the how question
24 and then you can ask your other question if he says
25 something different.

Sidebar

1794

1 MR. LUSTBERG: Okay.

2 THE COURT: But, again, it's really a form issue
3 and I understand, I really do.

4 So go ahead and ask. I'll let you ask those
5 questions.

6 Go ahead.

7 (Sidebar discussion concludes.)

8 (Continued on the next page.)

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Gallowitz - Direct/Mr. Lustberg

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1 (In open court.)

2 EXAMINATION BY

3 MR. LUSTBERG:

4 (Continuing.)

5 Q Mr. Gallowitz, you answered my prior question by saying
6 that this when you said you didn't trust them you said it
7 was because informs atypical.

8 Do you remember you said that?

9 A Yes.

10 Q And you said it was atypical because there was an
11 Interpol warrant, right?

12 A As well as October and then again April.

13 Q What do you mean October and then in April?

14 A Did one surveillance in October and then I had no
15 connection to anything going on between October and April
16 and then again in April.

17 Q So I just want to understand what's atypical about
18 that?

19 A Surveillances that I've worked on in the past don't
20 last that long.

21 Q Okay. Well, did you know whether there have been any
22 surveillance between October and April?

23 A Not to my recollection, I did not know.

24 Q And so, my question is: When you said it was atypical,
25 did you understand it to be unlawful in any way?

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1 A No.

2 Q Okay. And, in particular, did you understand that to
3 have anything to do with working for the Government of
4 China?

5 MR. HEEREN: Objection, your Honor.

6 THE COURT: Overruled.

7 A No.

8 Q Okay. I want to ask you about another exchange, this
9 is in evidence as Government Exhibit 4019-B beginning on
10 Page 43.

11 This is a text exchange between you and Mr. McMahon on
12 April 6th which was the day after you did surveillance with
13 him; do you see that?

14 A Yes.

15 Q Okay. And you asked him how did it go?

16 A Yes.

17 Q And Mr. McMahon says: "Great." Let me take you
18 through this. There actually will be a question at the end.

19 And Mr. McMahon says: "Got'em."

20 And you say: "Cool."

21 Can I ask -- let me stop there before we go, what did
22 you understand him to mean by "got'em"?

23 A He located the subject.

24 Q Mm-hmm, okay.

25 And you said -- and why did you say "cool"?

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1 A Congratulating him.

2 Q Okay. Mr. McMahon says: "And." Rather, you said,
3 "And." Sorry, you're agreeing.

4 Mr. McMahon says: "Very evasive maneuvers. Followed
5 him an hour away and got where he's living."

6 What did you understand that to mean?

7 A Pretty self-explanatory. He followed him and found out
8 where he's living.

9 Q Keep going.

10 You say: "Nice." You say: "And."

11 Mr. McMahon says: "Client very happy."

12 By the way, did you know who his client was?

13 A No.

14 Q Mr. McMahon says: "Home now."

15 Now, if we could just go to Page 55. Actually, let's
16 go back.

17 You ask: "Further surveillance." What were you asking
18 about, your own involvement or what were you asking about
19 there?

20 A Yeah, I was asking about if there would be further
21 surveillance where I would be...

22 Q Okay. Next.

23 Mr. McMahon says, "Not sure, waiting for a call."

24 And this is the e-mail I want to ask you about.

25 "Yeah from New Jersey State Police about an abduction."

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1 What did you mean by that?

2 A So I'm that guy, the guy who tells the crude joke, says
3 inappropriate things, and that's what that is. That's a
4 joke.

5 Q What did you mean by it?

6 A I don't recall what I meant by it, I was making a joke.

7 Q I'm trying to understand why you know talking about an
8 abduction would be a joke?

9 A Dark police humor, the only thing I can explain.

10 Q And Mr. McMahon says: "LOL, right?"

11 A Because he knows me and he laughed, yes.

12 Q Okay. I just want to go through one more set of these
13 texts with you. These are in evidence beginning on page --
14 Exhibit 4019 and, I'm sorry, Government Exhibit 4019-B,
15 Page 63.

16 By the way, you took some pictures while you were doing
17 surveillance with Mr. McMahon?

18 THE COURT: Did you take any pictures?

19 THE WITNESS: At some point, yes.

20 Q Okay. Mr. McMahon says: "They're thinking of what to
21 do. They're hoping his father convinces him to return the
22 money."

23 Did you understand what that meant?

24 A That his client is thinking of what to do.

25 THE COURT: The question, though, more properly,

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1 is do you recall what that was about, not are you
2 interpreting the text message as you're sitting here.

3 THE WITNESS: I don't recall this, no,
4 independently from pack then.

5 Q Let me show you a little bit more to see if it
6 refreshes your recollection. Let's go to the next one.

7 You say: "LOL, ROFL."

8 Next. Another LOL. Okay.

9 This is an e-mail from you to Mr. McMahon that says
10 maybe overt surveillance in their face, sit in front of
11 house, pictures, video, scared them.

12 By the way this, is written by you to Mr. McMahon,
13 correct?

14 A Yes.

15 Q Okay. And do you recall it?

16 A I don't recall doing it at the time, no. I see it now
17 and it's definitely me.

18 Q Okay. Does that -- it doesn't refresh your
19 recollection as to having a communication with Mr. McMahon
20 about this possibility?

21 A I wrote the e-mails, so I'm not going to say I didn't
22 write the e-mail, yes.

23 Q Okay. Do you remember what Mr. McMahon's response was?

24 A No.

25 Q Okay. Well, let me show you.

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1800

1 MR. HEEREN: Your Honor, just for the sake of the
2 record, I believe we've been referring to these as e-mails.

3 MR. LUSTBERG: I'm sorry. That's completely
4 correct. These are text messages. Thank you.

5 Q Mr. McMahon says: Yeah, possibly. We did that in
6 Little Ferry."

7 Do you know what he's referring to there?

8 A No.

9 Q Keep going. Not sure it worked. Do you remember this
10 exchange with Mr. McMahon?

11 A No.

12 THE COURT: Hang on. That's from Mr. McMahon to
13 the witness?

14 MR. LUSTBERG: Yes.

15 THE COURT: Okay. Go ahead.

16 Q Do you remember him saying that?

17 A Only by looking at the e-mail. I mean, the text, I'm
18 sorry.

19 Q So you have no independent recollection of having a
20 communication with Mr. McMahon about whether surveillance
21 should become overt?

22 A I obviously wrote the e-mail. So, I mean, do I
23 remember doing it from six years ago, no.

24 Q Okay. Did you ever switch over from covert to overt
25 surveillance?

Gallowitz - Direct/Mr. Lustberg

1801

1 A I did not.

2 Q Okay.

3 THE COURT: At that time?

4 THE WITNESS: At any time. I did not.

5 THE COURT: Okay.

6 Q At any time in this matter, with regard to this
7 surveillance, did you ever switch over from going from
8 covert surveillance to overt surveillance with regard to
9 this particular matter that you were working with
10 Mr. McMahon on?

11 A Not to my recollection, no.

12 Q Well, if you -- you're saying, "Not to your
13 recollection." If you had gone to overt, you would have
14 recalled that, wouldn't you?

15 MR. HEEREN: Objection.

16 THE COURT: Overruled.

17 Would you have recalled that?

18 THE WITNESS: Possibly.

19 Q At any point, did Mike McMahon give you any indication
20 that he understood that he was working for the Chinese
21 government?

22 A Never.

23 Q Did he give you any indication that he thought he was
24 working on a criminal matter?

25 A Showing me an internet [sic] warrant, I mean, if there

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1802

1 is some criminality involved, yes.

2 Q Did he share with you that he was -- that he thought he
3 was working to on that criminal matter?

4 A I was shown an Interpol warrant, I believe, or
5 something from TLO that he was wanted. And apparently, that
6 was the person we were looking for.

7 Q Did you have any understanding one way or the other as
8 to whether you were looking for him for purposes of that
9 criminal matter or to recover money from him or any other
10 purpose?

11 MR. HEEREN: Objection, your Honor.

12 THE COURT: Sustained as to form.

13 Q Did you understand what the purpose of the surveillance
14 was?

15 A To locate this individual.

16 Q And did you know what the purpose of locating the
17 individual was?

18 A No.

19 Q Okay.

20

21 (Continued on the next page.)

22

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25

Gallowitz - direct - Lustberg

1803

1 BY MR. LUSTBERG: (Continuing)

2 Q At any point, did you believe that what you were doing
3 was harassing anyone?

4 A Not at all, no.

5 Q Why not?

6 A Done dozens and dozens of surveillances the same way.

7 Q Just two other questions.

8 How much, Mr. Gallowitz, if you recall, did you earn
9 doing surveillance for Mr. McMahon in this matter?

10 A I don't recall.

11 Q Let's show you, it's Exhibit, it's in evidence,
12 Exhibit 3095.

13 Do you see that? I don't know if you can read it.

14 A I can read it.

15 Q Okay. Was this how much you got paid?

16 A Well, that was the total invoice. I actually got paid
17 1,120. The rest of it was expenses.

18 Q Okay. Were you paid by check or by cash?

19 A Check.

20 Q Have you ever received cash from clients in the course of
21 your business?

22 A Yes.

23 Q Is there anything wrong with that?

24 A No.

25 MR. LUSTBERG: That's all I have right now. Thank

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1 you.

2 THE COURT: Thank you very much.

3 Why don't we take our morning break right now. It's
4 11:15 so let's be ready to begin again at 11:30.

5 Don't talk about the case. Don't do any research.
6 Keep an open mind.

7 (Jury exits.)

8 THE COURT: Okay. The witness can step down and
9 you're excused from the courtroom.

10 (Witness steps down.)

11 THE COURT: We'll reconvene at 11:30, everyone --
12 actually, you know what? Have a seat, folks, just for one
13 second. I want to clarify something for the record.

14 I assume I perhaps misunderstood the exhibit but I
15 just want to make sure that the record isn't incorrect.

16 Mr. Lustberg, you asked some questions regarding the
17 "Wow" conversation and that's part of Exhibit 4019B. When I
18 looked at the document, it appeared that it was Mr. McMahon
19 who said "Wow," but the government didn't object, and then the
20 answer came in that, essentially, the positive answer but it
21 was really phrased in the question that the witness was the
22 one who said "Wow," but he affirmed that.

23 So I don't know why the government didn't object but
24 that seems incorrect just looking at the document.

25 MR. HEEREN: It was. I missed it at the moment,

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1 Your Honor.

2 THE COURT: Well, so I would suggest that somebody
3 correct it for the record.

4 MR. LUSTBERG: I'm happy to get up and correct that
5 before cross.

6 THE COURT: You may want to just so it doesn't
7 appear you were trying to misrepresent what the record was,
8 but I was scratching my head the whole time thinking I was
9 misreading the exhibit.

10 MR. LUSTBERG: Okay.

11 MR. HEEREN: Your Honor, one other very brief thing.
12 Sorry.

13 THE COURT: Yes.

14 MR. HEEREN: I just want to note Mr. Gallowitz
15 testified about his opinion that the defendant is heroic and
16 highly decorated and I believe he opened the door to some
17 inquiry related to character based on that. That would be
18 relevant to that. I think that that goes directly to
19 questions, particularly since it's been the highlight of the
20 defendant's case, about his understanding of the defendant's
21 character as it relates to issues like his professionalism and
22 experience at the NYPD. And so, so as not to surprise the
23 Court, the questions I would intend to ask would be about, in
24 particular, two substantiated CCRB violations that involve
25 substantiated findings of abuse of process and a finding of

Proceedings

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1 lack of credibility in testimony.

2 MR. LUSTBERG: So, Your Honor, we have -- obviously,
3 I object. We have received no notice of this, not that -- of
4 course, the government can --

5 THE COURT: Right.

6 MR. LUSTBERG: But after openings, at least, you
7 know, they were on notice that that was at least part of the
8 defense. I really don't -- I don't think it's appropriate. I
9 think it's, like, such a sandbagging to tell us now about it,
10 and we have, we've never received any discovery on this at any
11 time. It's -- and I mean I think this is -- it's obviously a
12 critical issue.

13 The Court has allowed in a good deal of evidence
14 about other unlawful acts including taxes, and all of that, I
15 think, is fair game, but I don't know the facts of this, of
16 these incidents. I don't have records of them. I have no way
17 of making an argument to the Court as to whether they've, in
18 fact, satisfied Rule 403 and whether that's appropriate
19 Rule 608(b) cross-examination. I feel like at this late date
20 to raise those kinds of issues as to which we've had no notice
21 is completely unfair.

22 THE COURT: Well, I think the, as a starting point,
23 part of the problem, I suspect, is that the witness didn't
24 give standard kind of character evidence which should be in
25 the form of reputational or reputation for some positive trait

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1 and typically it relates to truthfulness or untruthfulness.

2 Really what he said was he's a good, he was a good
3 cop, right?

4 MR. HEEREN: Heroic, a heroic cop and a highly
5 decorated cop. And respectfully, Your Honor, the rule does
6 permit opinion testimony on any pertinent character trait.

7 THE COURT: Right.

8 MR. HEEREN: So it's not just credibility. There's
9 a whole separate rule, of course, for credibility and
10 truthfulness.

11 THE COURT: Right.

12 MR. LUSTBERG: Judge, just to put this in context,
13 the questioning had to do with an e-mail that the government
14 put into evidence which referred to an SCU hero, where
15 Mr. Gallowitz is addressing Mr. McMahon as SCU hero. It's
16 about whether they should take their guns. I asked him to
17 interpret what was meant by SCU hero.

18 I should tell you -- I mean, I did not prepare -- I
19 think it's obvious. I did not have an opportunity to prepare
20 this witness.

21 THE COURT: Right.

22 MR. LUSTBERG: He would not meet with me, so it
23 wasn't like, you know, he was laying in wait to give that
24 answer at my instruction, but it was explaining a particular
25 phrase in a particular text -- if I'm stating it wrong, I

Proceedings

1808

1 apologize -- that the government introduced.

2 THE COURT: I don't think that's what the government
3 is referring to. So the witness said, I made a joke, and I
4 think he might have been referring to himself as a Street
5 Crime Unit hero but it was unclear, but in the beginning of
6 his testimony when you asked him how he knew the --

7 MR. LUSTBERG: No, that -- I'm sorry, Your Honor.
8 That isn't correct.

9 He answered the question in response to my specific
10 question, What was meant by SCU hero. We can check the
11 transcript but it was not at the beginning when I asked him
12 how he knew him. It was in connection with that specific text
13 message.

14 THE COURT: We can go back. I don't know if he used
15 the word "hero" at the beginning of his testimony, but I do
16 think he said, in a sense, he vouched for him being a very
17 good officer.

18 MR. LUSTBERG: He didn't.

19 THE COURT: Well, no, that I distinctly heard.

20 MR. LUSTBERG: Judge, he said that he knew him from
21 the drug unit. There was no opinion expressed as to whether
22 he was or wasn't a good officer, I don't think. We can look
23 at the transcript but I don't, I don't have -- I don't recall
24 that. I think this was all in response to questions regarding
25 the text message that the government put in evidence regarding

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1 an SCU hero.

2 MR. HEEREN: Your Honor, I believe that -- again, we
3 can check the transcript, obviously, but I believe the
4 question was, and how did -- it surrounded his understanding
5 of why Michael McMahon would know that he was joking in that
6 circumstance, and I believe his answer and why he was
7 referring to that is because he was a highly decorated police
8 officer --

9 THE COURT: Right.

10 MR. HEEREN: -- who engaged in, I believe he said
11 heroic acts while he was a street crime officer.

12 THE COURT: Weren't there also references at the
13 beginning part of his examination about -- here it is. I see
14 it now. Sorry. I'm looking at the transcript.

15 "I know Mike McMahon to be a highly decorated police
16 officer, detective sergeant from the NYPD, and I know he had
17 some heroic moments in the Street Crime Unit." And that is in
18 the context of when you asked him about why you reference SCU
19 hero. So he was saying he made a joke and that he was
20 basically saying that he knows Mike to be a decorated officer
21 with heroic moments.

22 I mean maybe you didn't intend to elicit the answer
23 but it came out as essentially a character reference for him.

24 MR. LUSTBERG: Your Honor, either way, the point is
25 that if there are, if there were CCRB proceedings against

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1 Mr. McMahon, I've had no opportunity to -- I don't know. As I
2 sit here right now, I know nothing about them. I have no
3 ability to make an argument to the Court which the Court needs
4 to hear as to whether, as to whether probative value outweighs
5 the prejudice. And, you know, I don't, the fact -- I mean,
6 you know, we haven't put in specific evidence of what he's
7 highly decorated for or anything like that and now the
8 government is going to want to put in evidence of misconduct
9 that he's alleged to have -- I mean I don't even know if it
10 was proved.

11 THE COURT: But you are presumably going to follow
12 the same line of argument you made in your opening which is he
13 was a highly decorated and maybe you won't use the word
14 "heroic."

15 MR. LUSTBERG: I really wasn't, no.

16 THE COURT: No, but in your opening, you said "hero"
17 as I recall --

18 MR. LUSTBERG: Yes.

19 THE COURT: -- or something to that effect and,
20 obviously, that has now been reinforced, in part, by reference
21 to this joke, but then it prompted the witness, at your
22 asking, to say, yes, my understanding was that he was highly
23 decorated and was a hero in the street crime unit. So you
24 have put in that evidence and you have followed up on that
25 theme.

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1 I'm not asking you to drop it in your argument, but
2 the point is if you are going to make use of that, those
3 references, because you opened on it and, quite honestly, I
4 didn't know if he was going to testify but now it's come in
5 through this witness, the question is does the government get
6 to offer, as the rules permit, some instances -- here's where
7 I wonder or where I question how far it can go -- but whether
8 the government gets to ask the witness, who's turned out to be
9 a bit of a character witness, in part, whether or not that
10 person's opinion of Mr. McMahon would be affected if he knew
11 that Mr. McMahon had two substantiated CCRB findings of not
12 credibility or non, yes, non-credibility and abuse of
13 authority.

14 That's what you said, right, Mr. Heeren?

15 MR. HEEREN: Yes, Your Honor.

16 For clarity, it's five substantiated findings of
17 abuse -- three substantiated findings of abuse of authority,
18 one substantiated finding of discourtesy and then one separate
19 substantiated finding of abuse of authority in a different
20 incident.

21 THE COURT: Now, properly, the government gets to
22 ask those questions to challenge the reputation evidence that
23 has been offered or good character evidence that's offered.

24 The government, of course, does not get to prove up
25 any of those incidents nor do they get to argue as a matter of

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1 fact that he was, he committed those offenses, and I'll give a
2 limiting instruction, but it can be offered for the limited
3 purpose of challenging what has been effectively introduced ad
4 character evidence, good character evidence, and that is fair.

5 You can cry foul but when you elicited it -- and I
6 assumed you knew you were going to do that because you opened
7 on the same theme, I'm not sure how you thought it would come
8 in otherwise -- you should have expected some kind of response
9 since, obviously, you and your client know what the record is.
10 I presume the government turned over the discovery relating to
11 that if it was -- well, I shouldn't assume that.

12 MR. HEEREN: We did not turn over the CCRB
13 documents. They're not discoverable in the ordinary course.

14 THE COURT: Right.

15 MR. HEEREN: As Your Honor referenced, it's his own
16 record. I would also note that many of the CC -- I don't know
17 if these specifically are, but many of these are now on a
18 public database as well.

19 THE COURT: So I will allow the government limited
20 cross-examination about would your opinion about his
21 reputation as a hero or as a decorated officer be different if
22 you knew, and then you could recite them, but I want you to do
23 it in the most bland way, that he was, he has X number of
24 substantiated CCRB claims for whatever it is and that's it.
25 The government doesn't get to do anything more.

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1 If he says no, it wouldn't affect my opinion, the
2 most the government gets to argue is you shouldn't credit that
3 reputation evidence because it seems to be immutable or
4 unimpervious to any kind of negative information and that's
5 it.

6 MR. LUSTBERG: Just so the record is clear, from my
7 perspective, I did not call this and I was not intending to
8 call any other reputation or opinion witness.

9 This witness was explaining a particular word that
10 was used in a particular text that the government, and I
11 didn't know when I was asking that question, just so it's
12 clear, who the hero was that was being referred to in that
13 text, whether it was Mr. McMahon or somebody else.

14 THE COURT: But it doesn't require you to intend it.

15 MR. LUSTBERG: I understand.

16 THE COURT: It's come in and it's before the jury
17 but let me say this. I'm somewhat skeptical on this claim
18 because you opened on calling him a hero officer and I don't
19 know how you expected it to come in.

20 MR. LUSTBERG: It wasn't through him.

21 THE COURT: But you opened it, you suggested it in
22 your opening, and then it did come in and it is in the record
23 now. The question really just is not whether you intended
24 that but what is fair for the government to do to try to
25 impeach that reputation evidence that has come in.

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1 MR. LUSTBERG: So Your Honor knows and, I mean, the
2 Court may be aware of this, these are apparently -- I still
3 don't have them. And, you know, should I have looked for
4 them? Maybe. But I mean CCRB, the CCRB is a civilian
5 complaint review board. It's not, there's not a standard of
6 proof where stuff has to be established by any particular
7 standard of evidence.

8 I suppose that Mr. Gallowitz may answer it that way,
9 I don't know, but I mean rather -- the point is that this
10 opens up, you know, for me, this can of worms about whether I
11 need to put on evidence of the unreliability of CCRB findings
12 or that kind of thing.

13 THE COURT: No. You can certainly redirect and ask
14 the witness why it doesn't change his opinion, and I'm sure
15 he'll blast back by saying, I don't credit anything that CCRB
16 says as a former police officer. Fine, it's all within the
17 context of the basis for his opinion, whether the jury should
18 accept his opinion about Mr. McMahon's reputation as a hero
19 cop, all fair game, but within that framework, you can ask
20 those questions.

21 Let me also say this. I don't think you can really
22 say, Oh, I didn't intend to elicit that answer, when you're
23 looking at a reference that you know this witness made to "SCU
24 hero."

25 MR. LUSTBERG: I thought it was --

Proceedings

1815

1 THE COURT: Hang on. You could have thought
2 whatever. I don't know what your client told you obviously,
3 but he was there in the moment. You could have misunderstood
4 what the comment was about but, nonetheless, you did open that
5 door. Wittingly or unwittingly, the door has been opened, the
6 evidence has been put into the record, the government gets to
7 make a fair response to the extent that that good character
8 reputation evidence is in there, and then you get to
9 rehabilitate or do whatever you think is appropriate on
10 redirect. I can predict what this witness will say when you
11 ask him why doesn't that affect your view of Mr. McMahon as a
12 great cop and I'm sure he'll criticize the CCRB. That's --
13 whatever he wants to do is fine, but that's all fair game for
14 both sides to go into.

15 MR. LUSTBERG: I just want to make sure that I
16 understand the extent to which the government can inquire
17 though. I mean I assume that the government can inquire as to
18 the specific facts of those cases.

19 THE COURT: No. The government -- and I do want
20 this to be very tightly scripted.

21 You will simply give, and I don't want you to milk
22 it and say are you aware of this one, are you aware of that
23 one. Give the summary number of substantiated findings and
24 the type. So would your opinion change if you knew that he
25 was the subject of five substantiated abuse of authority

Proceedings

1816

1 findings by CCRB and one or two, whatever it is, findings by
2 CCRB of non-credibility. That's it.

3 I don't want you milking this. I don't want you
4 belaboring it. You get in that and you're stuck with whatever
5 answer he gives you, yes or no. If you want to ask why, you
6 can, it's up to you, but I think we all know what his answer
7 will be.

8 MR. HEEREN: Your Honor, on the credibility finding,
9 it's not a -- as you see in the CCRB reports, it's not an
10 allegation recommendation. It is a finding about his
11 testimony in the course of one of the hearings.

12 THE COURT: But they made that finding.

13 MR. HEEREN: It is in the findings section as a
14 finding. I can highlight the specific one.

15 THE COURT: I'm a little more concerned about that.

16 MR. HEEREN: I understand.

17 THE COURT: Because it's somewhat far afield.

18 I think that you should stick with the substantiated
19 findings that they made about abuse of authority and that's it
20 because that goes to character as a hero cop.

21 The credibility finding might be in a very specific
22 issue and I don't think that that's fair to question his
23 reputation as a good officer based on a very fact-specific
24 finding that the CCRB made and so just stick with the
25 substantiated findings of certain conduct.

Proceedings

1817

1 MR. HEEREN: Yes, Your Honor.

2 THE COURT: Okay.

3 MR. LUSTBERG: Your Honor, just one last thing. So
4 that I can do meaningful redirect on this subject, I would
5 request that the government turn over any records it has with
6 regards to the CCRB cases at this point since I don't have
7 them.

8 THE COURT: Well, we're not going to be getting into
9 the specifics of what the CCRB proceedings were, but I do
10 think the defense should -- okay, you have it there,
11 Mr. Heeren -- get a copy of this, the substantiated findings,
12 what the language says, so that Mr. Lustberg can redirect as
13 appropriate.

14 MR. HEEREN: For the record, I've provided both of
15 the complete case closing forms that we received.

16 THE COURT: Okay. So, folks, I've eaten into your
17 break. Why don't you take a nature break if you need one.
18 Let's be ready to go in five minutes.

19 Mr. Lustberg, if you need a break before you do
20 redirect, I'll obviously give you some time.

21 MR. LUSTBERG: Thank you.

22 (Recess taken.)

23 (In open court; outside the presence of the jury.)

24 THE COURT: Let's go on the record for a moment.

25 So, folks, I'm trying to figure out the timing for

Proceedings

1818

1 today because it's possible that I will let the jury go home
2 before lunch because it would be unfair or unkind to them to
3 have them leave for an hour lunch only then to be excused
4 right after they get back.

5 So, Mr. Tung, I want to inquire of your client
6 whether he intends to plead -- this is terrible, I'm about to
7 do a plea which is why I had it in my mind, I'm so sorry --
8 whether or not your client wants to take the stand.

9 So, Mr. Zhu, yesterday, we discussed your right to
10 remain silent and not have it used against you at trial, but
11 we also discussed your right to take the witness stand if you
12 want to in your own defense. You told me that you hadn't
13 decided yet.

14 Have you decided whether or not you want to testify?

15 DEFENDANT ZHU: No, no testifying.

16 THE COURT: Sorry?

17 DEFENDANT ZHU: No testifying.

18 THE COURT: So you don't want to testify?

19 DEFENDANT ZHU: Yes, correct.

20 THE COURT: You understand, Mr. Zhu, it's your right
21 to testify and no one can prevent you from doing that
22 including your lawyer, do you understand that?

23 DEFENDANT ZHU: Okay. Okay.

24 THE COURT: Do you understand?

25 DEFENDANT ZHU: Okay. Okay.

Proceedings

1819

1 THE COURT: No. The question is do you understand
2 me?

3 DEFENDANT ZHU: Understood.

4 THE COURT: Okay. Even if Mr. Tung advised you not
5 to testify, you could still testify. Do you understand that?

6 DEFENDANT ZHU: Yeah. Yeah.

7 THE COURT: So you understand?

8 DEFENDANT ZHU: Understood.

9 THE COURT: And it is your decision not to testify,
10 is that correct?

11 DEFENDANT ZHU: Correct.

12 THE COURT: Okay. Then let me go back to the
13 attorneys now for a moment.

14 My understanding, Mr. Lustberg, is that the only
15 other thing you would want to do in your defense case is offer
16 up some stipulations, is that right?

17 MR. LUSTBERG: I will read two stipulations in the
18 record.

19 THE COURT: And, Ms. Wong, you'll confirm that, for
20 Mr. Zheng, you are not presenting any evidence, is that
21 correct?

22 MS. WONG: That is correct.

23 THE COURT: And your client is not testifying?

24 MS. WONG: That's correct.

25 THE COURT: It goes without saying, Mr. Lustberg,

Proceedings

1820

1 that Mr. McMahon is not testifying?

2 MR. LUSTBERG: I think you confirmed that with him
3 yesterday.

4 THE COURT: Yes. I just wanted to be sure in
5 realtime now that that's still the decision especially in
6 light of things we discussed just before the break or during
7 the break.

8 Is that correct, Mr. McMahon; you still do not want
9 to testify?

10 DEFENDANT McMAHON: That's correct.

11 THE COURT: And then, Mr. Tung, you don't have any
12 evidence to put on, is that correct?

13 MR. TUNG: That's correct, Your Honor.

14 THE COURT: Okay. Good. So then I think it makes
15 the most sense to allow the government to do
16 cross-examination. If we need to take a brief break for you,
17 Mr. Lustberg, to digest the CCRB information that you've
18 provided, I'll give you that, but then I would like to have
19 the redirect, if any, and the conclusion of the defense case
20 done before I let the jury go for the day and without a lunch
21 break.

22 Okay. Any objection to proceeding in that manner?
23 Government?

24 MR. HEEREN: No, Your Honor.

25 THE COURT: Mr. Lustberg?

Proceedings

1821

1 MR. LUSTBERG: No.

2 MR. GOLDBERGER: No, Your Honor.

3 MR. TUNG: No, Your Honor.

4 THE COURT: Okay. Good.

5 We'll go ahead and get the jury now and we'll start
6 with the government's cross, but I should ask of Mr. Tung and
7 Mr. Goldberger, did you want to examine this witness on
8 direct?

9 MR. GOLDBERGER: No.

10 MR. TUNG: No, Your Honor.

11 THE COURT: So let's get the witness back up here.

12 MR. LUSTBERG: And I'm going to do the "Wow"
13 correction.

14 THE COURT: Yes, correct the "Wow" series of texts.
15 Where is the witness? Someone get him from outside.
16 (Witness resumes the stand.)

17 (Jury enters.)

18 THE COURT: Please be seated, everyone.

19 Okay. So, Mr. Lustberg, you wanted to ask a couple
20 more questions.

21 MR. LUSTBERG: I just wanted to clarify -- I said no
22 further questions, but I wanted to qualify one thing I got
23 wrong.

24 THE COURT: Do you want to put the exhibit back up?

25 MR. LUSTBERG: Yes.

Gallowitz - direct - Lustberg

1822

1 THE CLERK: Yes, Exhibit 4019B.

2 MR. LUSTBERG: 4019B, page one.

3 BY MR. LUSTBERG: (Continuing)

4 Q Okay. I asked you, Mr. Gallowitz, whether -- this was an
5 e-mail from Mr. McMahon to you and it says, "Tlo says he
6 wanted by INTERPOL. Wow."

7 I asked you why you said, "Wow," but it turns out,
8 based on this, that Mister, it was Mr. McMahon who said,
9 "Wow." Do you see that?

10 A Yes.

11 MR. LUSTBERG: And I just wanted to -- I don't
12 remember what Mr. Gallowitz's response to that was. What's on
13 the next slide. The next slide is Mr. McMahon too? That's
14 it.

15 Q So Mr. McMahon was just letting you know that there was,
16 that this, the target was, of the surveillance was on an
17 INTERPOL warrant, right?

18 A Yes.

19 MR. LUSTBERG: Okay. That's all I have. Thank you,
20 Judge.

21 THE COURT: Thank you very much, Mr. Lustberg.

22 Any examination by other defendants?

23 Mr. Goldberger?

24 MR. GOLDBERGER: No, Your Honor.

25 THE COURT: Mr. Tung?

Gallowitz - cross - Heeren

1823

1 MR. RUNG: No, Your Honor.

2 THE COURT: Okay. So cross-examination by the
3 government.

4 MR. HEEREN: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. HEEREN:

7 Q Good morning, Mr. Gallowitz.

8 A Good morning.

9 MR. HEEREN: Good morning, ladies and gentlemen.

10 THE JURY: Good morning.

11 Q Mr. Gallowitz, I believe you testified on direct that you
12 previously worked for the New York City Police Department?

13 A Yes.

14 Q How long did you work for them again?

15 A Twenty years.

16 Q Okay. And during those 20 years, among the positions you
17 held was the position of detective, right?

18 A Yes.

19 Q And as a detective, part of your job was to investigate
20 and hopefully solve crimes, right?

21 A Yes.

22 Q And to do that, you would investigate and gather facts,
23 right?

24 A Yes.

25 Q You would look for suspicious activity, correct?

Gallowitz - cross - Heeren

1824

1 A Potentially.

2 Q That would be pertinent to an -- would suspicious
3 activity be pertinent to a criminal investigation?

4 A Yes.

5 Q Sometimes you would interview witnesses?

6 A Yes.

7 Q And when you didn't understand something a witness said,
8 would you ask follow-up questions?

9 A Potentially, yes.

10 Q If an answer didn't make sense, you would ask them to
11 clarify, right?

12 A It's a very broad question. You know, you're assuming
13 I'm by myself asking questions. It's a broad question.

14 Q I guess what I just want to understand is if something
15 didn't make sense to you that a person said, would you, as a
16 general matter, try to follow up and under, and get a better
17 understanding through further questioning?

18 A Sometimes, yes.

19 Q Okay. Now, after you figured out who committed a crime,
20 you would sometimes make arrests as a police officer, is that
21 right?

22 A Yes.

23 Q How many, approximately, arrests did you make while you
24 were at the NYPD? I know.

25 A Personally, about 500. Involved in a couple thousand.

Gallowitz - cross - Heeren

1825

1 Q Okay. And sometimes when you made arrests, would you get
2 an arrest warrant to make that arrest?

3 A Almost never.

4 Q Almost never? You are familiar with arrest warrants
5 though, right?

6 A I don't believe I've ever obtained an arrest warrant, no.

7 Q Do you know what an arrest warrant is?

8 A If you have probable cause, you go to the District
9 Attorney's Office and they'll potentially get you an arrest
10 warrant.

11 Q Right. And did you learn about that as a member of the
12 NYPD?

13 A I was not in the detective squad where that would take
14 place frequently so that's not something that I would do.

15 Q Okay. But did you know about it at the NYPD?

16 MR. LUSTBERG: Your Honor, objection to this line of
17 questioning. I have no idea what the relevance is.

18 THE COURT: I'll give you a little leeway but you
19 need to make that connection sooner. So go ahead.

20 MR. HEEREN: Sure, Your Honor.

21 THE COURT: Ask your next question. I mean I think
22 he didn't answer that question.

23 MR. HEEREN: I don't think so, Your Honor.

24 A Do I know what an arrest warrant is? Is that your
25 question?

Gallowitz - cross - Heeren

1826

1 Q While you were at the NYPD.

2 A Yes.

3 Q And after you arrested someone, I think you just said,
4 the DA's Office would take over at that point, right?

5 A Yes.

6 Q And they would handle prosecuting them, right?

7 A Correct.

8 Q Okay. And as a police officer, an NYPD police officer,
9 you're a government employee, right?

10 A Yes.

11 Q And the people, the prosecutors at the DA's office, they
12 were government employees as well, right?

13 A Yes.

14 Q Now, you were asked -- I'm going to change topics.

15 Do you recall being asked some questions on direct
16 examination about your invoices to Mr. McMahon?

17 A About one invoice, yes.

18 Q And that invoice was made out to McMahon Investigative
19 Group, right?

20 A Correct.

21 Q And that's because you were hired by the company McMahon
22 Investigative Group, right?

23 A Correct.

24 Q You were not working in a personal capacity for Michael
25 McMahon, right?

Gallowitz - cross - Heeren

1827

1 A Correct.

2 Q And so you billed it to the client which was the company,
3 right?

4 A That's correct.

5 Q Now, you -- I believe you indicated on direct that you
6 did not know who Mr. McMahon's clients were, correct?

7 A Correct.

8 Q Mr. McMahon never gave you their names, right?

9 A No.

10 Q I want to show you what's been previously admitted as
11 Government's Exhibit 902F, as in "Frank."

12 MR. HEEREN: And if you can blow that up, please.

13 Q Do you recognize anyone in this picture?

14 A Yes.

15 Q Who do you recognize?

16 A Michael McMahon.

17 Q Do you recognize anyone else in the picture?

18 A No.

19 Q Were you there when this picture was taken?

20 A No.

21 Q So you have no knowledge of what occurred during the time
22 of this picture, is that right?

23 A That's correct.

24 Q I want to show you what's been admitted into evidence as
25 Government's Exhibit 103C.

Gallowitz - cross - Heeren

1828

1 MR. HEEREN: And if you can blow up the bottom left
2 corner, please.

3 Q The person in the black jacket, do you recognize that as
4 Michael McMahon?

5 A Based on the quality of the picture, maybe.

6 Q Okay. Did you ever take a meeting with Michael McMahon
7 and any of his clients at a Panera Bread in April of 2017?

8 A No.

9 Q Okay. So you have no knowledge of what occurred at that,
10 at a meeting, at any meeting in April 2017 at a Panera Bread
11 between Michael McMahon and any of his clients, is that right?

12 A That's correct.

13 Q Now, I believe, I believe you testified on direct exam
14 that you regarded Mr. McMahon as highly decorated and heroic,
15 is that right?

16 A Correct.

17 Q Would your opinion about Mr. McMahon's reputation as a
18 hero or highly decorated officer be affected if you knew he
19 was the subject of a substantiated finding of discourtesy by
20 the Civilian Complaint Review Board?

21 A Absolutely not.

22 Q Would your opinion about his reputation as a hero or
23 highly decorated officer be affected if you knew he was the
24 subject of four additional substantiated findings for abuse of
25 authority by the Civilian Complaint Review Board?

Gallowitz - cross - Heeren

1829

1 A Absolutely not.

2 Q Mr. Gallowitz, do you recall asking some questions about
3 when you texted Mr. McMahon which you characterized as a joke
4 about receiving a call about an abduction?

5 A I'm not sure what the question is.

6 Q Sure. Do you recall on direct examination being asked
7 about a series of text messages where you said to Michael
8 McMahon we're going to get a call from the New Jersey State
9 Police about an abduction?

10 A I recall seeing the text message, yes.

11 Q And I believe you characterized it on direct as a joke,
12 is that right?

13 A Correct.

14 Q Okay. And you said you, I think you said something like
15 you have a lot of jokes, right?

16 A Yes.

17 Q Probably some about lawyers too?

18 A Maybe.

19 Q Maybe. But you didn't, you didn't joke about a lawyer at
20 that point in time, right?

21 A At what point in time?

22 Q Well, when you sent the text, the joke wasn't about a
23 lawyer showing up, right?

24 A No.

25 Q It wasn't a joke about someone coming to collect a debt,

Gallowitz - cross - Heeren

1830

1 right?

2 A No.

3 Q And do you know what a process server is?

4 A Yes.

5 Q What is a process server?

6 A Someone who serves court documents to individuals or
7 companies.

8 Q Right. Like things for, like, subpoena for a civil
9 lawsuit, right?

10 A Yes.

11 Q You didn't joke about a process server coming, right?

12 A No.

13 Q You joked about somebody being abducted, taken from one
14 place to another, right?

15 A That was the joke, yes.

16 Q Okay. Do you recall being asked several questions on
17 direct examination about calling, about Michael McMahon
18 calling the local police department?

19 A Yes.

20 Q And the reason why you called -- well, withdrawn.

21 I believe you also testified that you carried your
22 gun with you on the surveillance, right?

23 A Every day.

24 Q You always carry your gun on surveillance?

25 A Yes.

Gallowitz - cross - Heeren

1831

1 Q And you called -- Michael McMahon called the police to
2 let them know you were going to be there, right?

3 A That's what I was told, yes.

4 Q Right. And one reason why he would do that, to your
5 understanding, one reason why he would do that is to make sure
6 they don't show up and find you with guns; they know you're
7 there, because it can be a little concerning otherwise, right?

8 A Never crossed my mind once, no.

9 Q No? Okay. And when you called the police to let them
10 know you're there, you know that if they get a call for a
11 suspicious vehicle, they're less likely to show up, right?

12 A Correct.

13 Q And you also know that Mr. McMahon did not tell them
14 anything about what you were doing other than you were doing
15 surveillance, correct?

16 A I have no idea.

17 Q Okay. Let me see if I can show you something that will
18 refresh your recollection.

19 MR. HEEREN: I'd like to show for the witness only
20 what's been marked by the government as Government's
21 Exhibit EG-3 which for defense purposes, this has previously
22 been marked as Government's Exhibit 4019, at page 135.

23 First, if we can show Mr. Gallowitz the top half --
24 well, I think we can see all of it.

25 Q This is another text message between you and Michael

Gallowitz - cross - Heeren

1832

1 McMahon along the lines of the others we've seen, right?

2 A Yes.

3 Q And this text message was sent on October 5, 2016, right?

4 A Yes.

5 MR. HEEREN: Your Honor, the government moves to
6 admit Government's Exhibit EG-3.

7 MR. LUSTBERG: No objection.

8 MR. GOLDBERGER: No objection.

9 MR. TUNG: No objection.

10 THE COURT: Admitted. You may publish.

11 (So marked.)

12

13 (Continued on next page.)

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Gallowitz - Cross - Heeren

1833

1 BY MR. HEEREN (Continuing):

2 MR. HEEREN: Just blowing up the text part.

3 Q You wrote: You are not planning to Short Hills PD why we
4 are there, correct?

5 There's a typo, but did I read that right.

6 A That's what it says, yes.

7 Q Then let's look at page two, the response. McMahon
8 writes back: No, just a phone call to them.

9 Did I read that right?

10 A Yes.

11 MR. HEEREN: You can put that down. Thank you,
12 Ms. McMahon.

13 Q Mr. Gallowitz, I believe you testified on direct that you
14 have conducted dozens of surveillances all in the same way and
15 that's why this wasn't -- this particular one wasn't a problem
16 for you; is that right?

17 A Correct.

18 Q In those dozens of prior surveillances, how many involved
19 your client bringing an elderly man from halfway across the
20 world to --

21 MR. LUSTBERG: Objection.

22 THE COURT: Overruled.

23 If you can, answer that.

24 A Repeat the question.

25 Q Sure. In the dozens of surveillances that you said were

Gallowitz - Redirect - Lustberg

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1 done the same way, in how many instances did your client bring
2 an elderly man from a foreign country to the United States as
3 part of the surveillance?

4 A None.

5 MR. HEEREN: No further questions, your Honor.

6 THE COURT: Thank you, Mr. Heeren.

7 Redirect?

8 MR. LUSTBERG: Just one question.

9 THE COURT: All right.

10 REDIRECT EXAMINATION

11 BY MR. LUSTBERG:

12 Q Mr. Gallowitz, Mr. Heeren just asked you a few questions
13 about why -- whether your opinion of Mr. McMahon would change
14 based upon the fact that there were certain substantiated
15 allegations in front of the Citizens Complaint Review Board.

16 Do you remember those questions?

17 THE COURT: Civilian Complaint Review Board, but go
18 ahead.

19 MR. LUSTBERG: I said citizens. I meant civilian.

20 Thanks. I should know that.

21 A I remember being asked that just now.

22 Q You said that it absolutely would not change your
23 opinion, correct?

24 A Correct.

25 Q And why is that?

Gallowitz - Redirect - Lustberg

1835

1 A So, if you want to talk about the Civilian Complaint
2 Review Board, it changed throughout. I'm talking about my
3 tenure in the police department.

4 It was basically an internal board that had outside
5 members. And then at some point, it changed and it had
6 nothing to do with the police department and became like a
7 government entity.

8 So, you didn't specify when those took place. And
9 you know, when it was internal, it was viewed as not
10 legitimate in many people's eyes.

11 Q And when you say it was "not legitimate in many people's
12 eyes," what do you mean by that?

13 A So, you have so many interactions with the public when
14 you're a police officer, a detective. Anybody can make a
15 complaint about anything. We viewed it as a numbers game.
16 Just like when you get a red light summons, the judge is going
17 to give some people off and some people not.

18 It was a numbers game in the police department at
19 one point of who got substantiated and who didn't.

20 MR. LUSTBERG: Thank you, Judge. Nothing further.
21 Thank you.

22 THE COURT: Thank you.

23 Any recross?

24 MR. HEEREN: No, your Honor.

25 THE COURT: Thank you very much. Thank you for your

Proceedings

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1 testimony. You're free to go.

2 (Witness excused.)

3 THE COURT: Mr. Lustberg, did you want to introduce
4 anything else or call any other witnesses?

5 MR. LUSTBERG: Actually, Ms. Conti will handle this.

6 THE COURT: Ms. Conti, you have the floor.

7 MS. CONTI: I just want to read two stipulations
8 into the record.

9 THE COURT: All right.

10 MS. CONTI: I'll guess I'll do that on the Elmo to
11 start.

12 The first one has been marked Defendant McMahon
13 Exhibit ZZ.

14 THE COURT: Okay, published on the Elmo.

15 (Exhibit published to the jury.)

16 MS. CONTI: The stipulation McMahon Exhibit ZZ
17 reads:

18 It is hereby stipulated and agreed by and between
19 the undersigned parties through the undersigned counsel that:

20 Government Exhibit 407 consists of true and accurate
21 copies of records obtained from the Township of Millburn
22 Police Department.

23 Government Exhibit 410 consists of true and accurate
24 copies of records obtained from the Warren Township Police
25 Department.

Proceedings

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1 The exhibits identified above are authentic pursuant
2 to Federal Rules of Evidence 901 and 902. Government Exhibits
3 407 and 410 are records of regularly conducted activities as
4 defined by Rule 803(6) of the Federal Rules of Evidence.
5 Government Exhibits 407 and 410 are admissible in evidence at
6 trial.

7 This stipulation, which is marked McMahon Exhibit
8 ZZ, is admissible in evidence at trial.

9 THE COURT: Thank you.

10 Anything else?

11 MS. CONTI: I'm just going to pull the exhibits up
12 as well, if I can switch to the...

13 THE COURT: The computer from there?

14 You're lucky, Mr. Lustberg, she understands the
15 technology.

16 MR. LUSTBERG: You have no idea.

17 THE COURT: I think I do.

18 MR. LUSTBERG: I know you do.

19 MS. CONTI: My computer doesn't understand the
20 technology, though.

21 So, I'm showing what has been marked as Government
22 Exhibit 401 pursuant to the --

23 THE COURTROOM DEPUTY: 407.

24 MS. CONTI: Sorry, 407, pursuant to the McMahon
25 Exhibit ZZ stipulation.

Proceedings

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1 (Exhibit published to the jury.)

2 MS. CONTI: And I'll just blow this up.

3 And I'd like to move in for submission Government
4 Exhibit 407.

5 THE COURT: It is admitted.

6 Weren't there other exhibits that were --

7 MS. CONTI: Yes, and moving to Government Exhibit
8 410, I'd like to move into evidence as well.

9 THE COURT: Both of those are admitted and they may
10 be published.

11 Thank you, Mr. Lustberg, on that.

12 (Government Exhibits 407 and 410 so marked.)

13 (Exhibit published to the jury.)

14 MS. CONTI: Thank you, your Honor.

15 THE COURT: Now we're looking at 410.

16 MS. CONTI: Yes, this is Government Exhibit 410.

17 And then I'm going to read the other exhibit.

18 THE COURT: Okay.

19 MS. CONTI: Switching back to the Elmo.

20 So, I'm now reading what has been marked as McMahon
21 Exhibit AAA:

22 It is hereby stipulated and agreed by and between
23 the undersigned parties through the undersigned counsel that:

24 The phone number for the Township of Millburn Police
25 Department is 973-564-7001.

Proceedings

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1 The phone number for the Millburn Police Department
2 is 908-753-1146.

3 This stipulation, which is marked McMahon
4 Exhibit AAA, is admissible in evidence at trial.

5 One second, your Honor.

6 MR. LUSTBERG: With that, your Honor, Defendant
7 McMahon rests.

8 THE COURT: Thank you very much, Mr. Lustberg.
9 Does Defendant Zheng want to introduce any evidence
10 or --

11 MR. GOLDBERGER: No, we rest.

12 THE COURT: And Mr. Tung for Mr. Zhu?

13 MR. TUNG: We rest too.

14 THE COURT: Thank you very much, everyone.

15 Ladies and gentlemen, it means we are ending our day
16 a little early. And in fact, you don't even have to break for
17 lunch because we're ending at quarter after noon.

18 So, what's going to happen is there are matters that
19 I need to address with the parties between now and tomorrow
20 morning, when you will hear summations by the parties.

21 So, you have the rest of the day off. Hopefully
22 you'll enjoy it. Do not talk about the case, do not do any
23 research, and keep an open mind. We are truly in the final
24 stages of the trial.

25 Let me also add, just in case you're wondering,

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1 after the summations I will instruct you on the law and then
2 you will begin deliberating.

3 Thank you, everyone. Have a great afternoon and
4 evening.

5 (Jury exits.)

6 THE COURT: So, folks, why don't we do this: Let's
7 take a slightly longer lunch break since we have the benefit
8 of additional time. Let's start again at two. And that's
9 partly driven by the fact that I have a 1 o'clock matter also
10 to deal with. So, we'll start at two with the charge
11 conference. Obviously, we will address the filings from
12 yesterday from Mr. McMahon's lawyers and the Government.

13 The one thing I want to put on the record as well,
14 though, regarding the issue that just arose based on the CCRB
15 information and what was the character evidence that came in,
16 I did want to make clear that I did weigh the probative value
17 of -- or, rather, I considered the prejudice, I should say, or
18 the potential prejudice of the cross-examination that the
19 Government did and requested to do.

20 And what I intend to do is include in the jury
21 charges, which we'll discuss in a moment, a further limiting
22 instruction that they should not consider any reference to
23 substantiated CCRB allegations with respect to determining the
24 Defendant's guilt or innocence but, rather, that information
25 was permitted or that cross-examination was permitted for a

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1 very limited purpose, which was simply as it relates to the
2 testimony by the witness regarding the reputation of
3 Mr. McMahon or his opinion about the reputation of Mr. McMahon
4 for good character.

5 Obviously, it will be phrased much more artfully
6 than I just expressed it.

7 But also, if, Mr. Lustberg, you and your colleague
8 want to suggest a limiting instruction, you can do so. So, if
9 you cobble together something over the break, just offer that
10 up to my law clerk, and we'll consider that.

11 MR. LUSTBERG: Thank you, your Honor. We will.

12 It was actually mentioned yesterday there were just
13 a couple tweaks we had, and one of them was to the limiting
14 instruction that you already had with regard to the other
15 matters, in part because I think you wrote that before some of
16 those came in.

17 So, we'll tweak that all together.

18 THE COURT: That's good. And that's where I would
19 add it as well, just to say that all of those pieces of
20 information really should only be given limited consideration
21 by the jury. And this one in particular, I will cabin in by
22 saying it really only goes to their assessment of his opinion
23 about Mr. McMahon's reputation for good character.

24 So, we'll see you at 2 o'clock then. Thanks,
25 everyone. Have a good lunch. (Luncheon recess taken.)

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1 AFTERNOON SESSION

2 2 o'clock p.m.

3
4 (In open court; jury not present.)

5 THE COURT: Let's go on the record.

6 MR. LUSTBERG: Your Honor, just before you start, I
7 wanted to let you know Mr. McMahon is not present and I just
8 want to formally waive his appearance.

9 I spoke to him at length and told him that I didn't
10 think that he needed to be present for this and that I would
11 tell the Court. If necessary, I can get him here.

12 THE COURT: No. In fact, often defendants choose
13 not to be here for the charge conference since it's not really
14 something they can contribute to or opine about.

15 So, Mr. Zheng --

16 MR. GOLDBERGER: I'll let my client go as well.

17 THE COURT: Okay.

18 Mr. Zheng, you're waiving your appearance here for
19 the charge conference?

20 DEFENDANT ZHENG: Yes.

21 THE COURT: Mr. Tung, do you know if Mr. Zhu wants
22 to be here for the charge conference?

23 MR. TUNG: Mr. Zhu indicates that he still wanted to
24 participate.

25 THE COURT: Certainly. That is his right and he

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1 should stay here, then.

2 Why don't we go in order, just because I think that
3 will be the most efficient even though I know we have some
4 more substantive issues to discuss further on in the charges.
5 But let's just start from the beginning.

6 So, as I mentioned yesterday, my normal process is
7 I'll have the parties let me know where their first objection,
8 comment, or suggestion is and then we'll go through the
9 instructions in order.

10 So, Government, where's your first comment,
11 suggestion, or objection?

12 MR. HEEREN: Our first ones, which are typos, so
13 minor, are on Page 1, the second paragraph.

14 THE COURT: Okay.

15 MR. HEEREN: And they are -- I believe Zheng
16 Congying's name is incorrectly spelled. The last name should
17 not have a "H" in it, at least in my draft.

18 THE COURT: Page 1, let me get to the right page.
19 Sorry, what did you say, no "G" at the end?

20 MR. HEEREN: No. No "H" in Congying.

21 THE COURT: You're right.

22 MR. HEEREN: In that same sentence, we would add --
23 we would strike "one count of" as unnecessary verbiage.

24 And we would ask to include at the end right before
25 the word "stalking," "interstate."

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1 Just to be clear it should read, "conspiracy to
2 engage in interstate stalking, and interstate stalking."

3 THE COURT: Yes.

4 MR. HEEREN: And that's all we have on Page 1, your
5 Honor.

6 THE COURT: So, that sentence will now read: The
7 Defendant, Michael McMahon, Zheng Congying -- correctly
8 spelled -- and Zhu Yong are charged with one count of
9 conspiracy to act as an agent of a foreign government, acting
10 as an agent of a foreign government, conspiracy to engage in
11 interstate stalking, and interstate stalking."

12 Correct.

13 MR. HEEREN: That's right.

14 We had proposed to strike "one count of" just
15 because it's a little confusing, but it's more...

16 THE COURT: You're absolutely right. Let's do that.
17 Any objections to those requested changes?

18 MR. LUSTBERG: No, your Honor.

19 MR. GOLDBERGER: No, your Honor.

20 MR. TUNG: No, your Honor.

21 THE COURT: Okay. Next thing from the Government,
22 what page?

23 MR. HEEREN: One moment, your Honor. I believe our
24 next one is not until -- I believe it's Page 11, but my red
25 lining may have changed things.

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1 It is in the section charts -- excuse me, it's in
2 the section, Section 15, transcripts --

3 Do I have one before that?

4 MS. ARFA: Seven.

5 THE COURT: Let me ask my law clerk to do one thing.

6 Since it's a little confusing to have the page
7 numberings go one, two, and start over again, could you do
8 just the little Roman "i", "ii", for the next page. And the
9 table of contents will be little Roman iii and iv, and then
10 we'll start with 1.

11 Sorry, what did you say now, Mr. Heeren?

12 MR. HEEREN: I misspoke, your Honor. Our next one
13 is at Page 6. It's Part 7, testimony of law enforcement
14 officers.

15 THE COURT: Does anyone else have anything before
16 Page 6?

17 MR. LUSTBERG: No, your Honor.

18 I shouldn't speak for the others.

19 MR. GOLDBERGER: No, your Honor.

20 MR. TUNG: No.

21 THE COURT: Go ahead.

22 MR. HEEREN: In the first sentence of Section 7, we
23 would propose adding "current and former" before "law
24 enforcement officers."

25 THE COURT: Any objection?

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1 MR. LUSTBERG: No.

2 MR. GOLDBERGER: No, your Honor.

3 THE COURT: So we'll make that change.

4 Next?

5 MR. HEEREN: Our next one is in Section 13,

6 translations. It's a minor typo.

7 THE COURT: Okay, what section is it?

8 MR. HEEREN: 13, your Honor, translations.

9 THE COURT: Is it page -- oh, Section 13, not
10 Page 13.

11 MR. HEEREN: Yes, I'm going by sections. It's a
12 little bit easier, I think.

13 THE COURT: All right. Go ahead.

14 MR. HEEREN: And it's the fifth line. The sentence
15 begins, "The interpreters translated the witnesses'
16 testimony..."

17 There's just an extra "S."

18 THE COURT: I see that. Corrected.

19 MR. HEEREN: Then our next one is...

20 THE COURT: I'll leave it to the defense to
21 interject if you have something in between the last page and
22 the next one the Government mentions.

23 MR. HEEREN: The next one is Section 15, transcripts
24 of audio recordings. And this is just to clarify -- it's a
25 modification to clarify that the transcripts were through

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1 subtitles.

2 So, the way we propose to do it is in the first
3 sentence, we would change "distribute" to "use." So, the
4 sentence begins, "The Government has been permitted to use
5 transcripts," and then it continues.

6 THE COURT: Can I ask you one question?

7 Am I wrong, I thought at one point you might have
8 distributed transcripts without using them as subtitles.

9 MR. HEEREN: We did that for I believe one
10 recording, the recording at the hotel.

11 THE COURT: Right.

12 MR. HEEREN: And then we showed it on the screen
13 while they heard -- while the witness heard the Chinese
14 language and was able to speak about it.

15 THE COURT: So, shouldn't this remain the same and
16 maybe, if anything, add "distribute or use transcripts"?

17 MR. HEEREN: That's fine too.

18 THE COURT: Let's just do that because that's at
19 least what I think we were thinking, my law clerk and I, when
20 we used that phrasing, because at least I remembered that
21 there was a freestanding transcript given to them in a binder.

22 So, the Government has been permitted to distribute
23 or use transcripts.

24 MR. HEEREN: Yes.

25 THE COURT: Should we say "transcripts" or

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1 "subtitles"?

2 MR. HEEREN: The way we had tried to make that
3 clear, since it's still, I think, technically a transcript
4 even though in subtitle form, is that at the end of the
5 sentence we just add the following phrase; so after the word
6 "evidence," we'd say, "comma, many of which you saw in the
7 form of subtitles to videos that were played for you."

8 THE COURT: I'm not sure that actually makes sense
9 because the sentence you're referring to starts with
10 "however," right?

11 MR. HEEREN: No. I'm still on the first sentence,
12 your Honor.

13 THE COURT: Oh, I see what you're saying. Okay.

14 MR. LUSTBERG: Sorry, I'm lost.

15 THE COURT: We're looking at the first sentence --

16 MR. LUSTBERG: I see the sentence, I have just lost
17 the train of what the proposed change is.

18 THE COURT: How about this, "or used transcripts,
19 some in the form of subtitles"? How about that?

20 MR. HEEREN: That's fine, your Honor.

21 THE COURT: So, the first sentence of Section 15
22 will read, "The Government has been permitted to distribute or
23 use transcripts, some in the form of subtitles containing the
24 Government's interpretation of what was said," and then the
25 rest will remain the same.

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1 Any objection to that?

2 MR. LUSTBERG: No, your Honor.

3 THE COURT: Okay. So we'll make that change and
4 then I think it will apply to everything. Okay.

5 Anything else?

6 MR. HEEREN: Nothing in that section.

7 Our next one is a minor typo in Section 18,
8 cautionary and limiting instructions, but I think that brings
9 us to at least our first substantive item that Mr. Lustberg
10 filed a few moments ago, unless defense counsel has anything
11 else before that.

12 THE COURT: So, we're going to take out "if
13 applicable" in Section 18. Clearly, it does apply.

14 Anything before Section 18 from the defense?

15 If so, just let me know. We're now on Page 12.

16 MR. LUSTBERG: Nothing for Mr. McMahon, your Honor.

17 THE COURT: Mr. Goldberger?

18 MR. GOLDBERGER: Nothing, your Honor.

19 THE COURT: Mr. Tung?

20 MR. TUNG: Nothing.

21 THE COURT: So, now let's address the limiting
22 instructions. The defense, specifically Mr. Lustberg, has
23 offered up a track change version. Everyone has a copy, I
24 assume.

25 MR. HEEREN: Yes, your Honor.

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1 THE COURT: I'm going to take a moment to review it
2 and then I'll hear from the Government if they have any
3 objections to it.

4 (Pause in proceedings.)

5 THE COURT: This actually seems fine to me, the
6 proposed revised version.

7 Does the Government have any issue with it?

8 MR. HEEREN: Some minor ones, your Honor.

9 In the first paragraph, the last sentence, "This
10 evidence can be only considered by you only," I would strike
11 the first "only."

12 MR. LUSTBERG: At least one of the two.

13 THE COURT: So, let's strike the first one.

14 "This evidence can be considered by you only for
15 that particular purpose."

16 MR. LUSTBERG: Sorry about that.

17 THE COURT: No, it's okay.

18 MR. LUSTBERG: Just so it's clear, I just took out
19 that other sentence because I don't think you had actually
20 given any limiting instructions during the trial that's, you
21 know...

22 THE COURT: I think that's right, I did not end up
23 doing it at the moment, at least for these.

24 I do, of course, recall giving the transcript
25 instruction a few times, but I didn't -- I don't think I gave

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1 them the limiting instruction on the other crimes. I think we
2 just discussed it but I never instructed the jury.

3 So, this is better anyway, I think.

4 MR. HEEREN: I will note, your Honor, you have given
5 other limiting instructions. For example, after
6 Mr. Goldberger's opening as well as related to the
7 demonstratives.

8 But we don't believe -- we take it that the jury
9 will follow the instructions and don't need to be reminded of
10 that.

11 THE COURT: That's right. But more importantly, I
12 didn't mention any of these that are in this section.

13 MR. HEEREN: Correct.

14 THE COURT: Okay. So, now, anything else from the
15 Government with respect to the proposed revised version of
16 Section 18?

17 MR. HEEREN: Not until the paragraph that begins
18 "second," which I think is technically the third paragraph.

19 We would propose striking the addition of
20 "Mr. McMahon is not charged with any offenses as a result of
21 these violations" and just begin with "Evidence that
22 Mr. McMahon."

23 The Court's going to instruct the jury on what he's
24 charged with elsewhere in the instructions and I think it
25 would only cause confusion to talk about what he is and is not

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1 charged with here. The important point is clear from the
2 remainder, which is the evidence that was admitted is to be
3 used only for this limited purpose regarding intent.

4 THE COURT: Mr. Lustberg, do you want to be heard on
5 this?

6 MR. LUSTBERG: Your Honor, I just want -- it's
7 pretty transparent. I just want it to be clear that there are
8 a number of potential offenses that have been raised by the
9 Government's presentation and that Mr. McMahon is not charged
10 with any other offenses.

11 I'm not wedded to this language, but that was the
12 thought that I was trying to convey; that he's not charged
13 with tax offenses, he's not charged with violation of privacy
14 laws. Those are things that are not matters for which he's
15 charged.

16 THE COURT: I'm going to leave it as proposed by
17 Mr. Lustberg and Ms. Conti. I think this is fine because I
18 think in this context it makes the point clearly and I don't
19 think the jury will be confused that somehow it doesn't mean
20 that it isn't relevant, because the next sentence says that it
21 is, to the crimes charged in the indictment.

22 So, I'm going to leave that as is. I think that's
23 helpful.

24 MR. HEEREN: Yes, your Honor.

25 I did miss a typo in the paragraph immediately above

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1 in the second to last sentence, where it says "which I will
2 also refer to in these instructions," it should be an "S."

3 THE COURT: Yes.

4 MR. HEEREN: Yes.

5 THE COURT: Excellent.

6 MR. HEEREN: Then the last substantive one is on the
7 character witness limiting instruction. It's the word
8 "challenging" that Mr. Lustberg has proposed.

9 My understanding of the rule -- the Government's
10 understanding of the rule is that the character, be it the
11 cross-examination is admissible to assess the credibility of
12 the witnesses' testimony as to the Defendant's character.

13 So, rather than using the word "challenging," the
14 Government would propose using some phrasing that makes it --
15 makes clear that the purpose is for the jury's assessment of
16 the witnesses' testimony on that subject. I think
17 "assessment" was the word I recall the Court using before we
18 took a break.

19 And, so, I don't feel strongly about the exact
20 phrasing, but I don't think "challenging" is necessarily
21 accurate.

22 MR. LUSTBERG: I was doing my best to channel what I
23 remembered the Court saying, but I think Mr. Heeren's point is
24 well taken. "Challenging" is a little broad.

25 I wish I remembered what your Honor had said at the

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1 time because I think you laid out a very good limiting
2 instruction earlier and I just didn't write it down.

3 THE COURT: How about, "Those proceedings were only
4 raised in the context -- " maybe, "raised to the extent you
5 think it's relevant to assessing Mr. Gallowitz's opinion," but
6 that actually doesn't make sense. Hold on one second.

7 I actually don't think I was that clear about how it
8 should be phrased either. Hold on a second.

9 So, those proceedings were only raised...

10 MR. HEEREN: Your Honor, how about "raised in the
11 context of assessing"?

12 THE COURT: I think that's fine.

13 MR. LUSTBERG: I'm fine with that too, your Honor.

14 THE COURT: The hesitation really was over mixing
15 sort of why it was raised versus how it should be considered,
16 if that makes sense.

17 MR. LUSTBERG: Yes.

18 THE COURT: And I think this is neutral enough. So,
19 "were only raised in the context of assessing Mr. Gallowitz's
20 opinion."

21 I think it's fine; not perfect, but I think that
22 will work. Sorry. If I can come up with something better, I
23 would, but I think that that's fine.

24 MR. LUSTBERG: So do I.

25 THE COURT: Hang on one second.

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1 (Discussion off the record.)

2 THE COURT: My law clerk was wanting to confirm that
3 there's no objection to this proposed strikeout of the second
4 part of the very first sentence of this section. And that
5 begins, "During the trial in this case, I admitted particular
6 items of evidence for a limited purpose."

7 And it is correct we are striking it because I never
8 instructed anybody on it during the trial. So, it is struck.
9 I'm confirming for my law clerk now that I understand what the
10 question is.

11 That's going to make the record sound like
12 gibberish, but...

13 Anything else after Section 18? What's next?

14

15 (Continued on the following page.)

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1 (Continuing)

2 MR. HEEREN: I think the next item is No. 19, which
3 is the uncalled witnesses equally available but raises the
4 material witness question raised by Mr. Lustberg.

5 THE COURT: Yes. Okay. That is on page -- what
6 page is that on? It is the same page, yes, in the original.

7 So, Mr. Lustberg, I have reviewed the proposed
8 charge you want on this and I'm not going to include that. I
9 don't think or agree that that is the state of the law, this
10 notion of inferring something negative from the fact that the
11 Government did not call a witness who has invoked the Fifth
12 and could have been immunized. You cite, I think, one
13 decision from 1997. You cite another case that I don't think
14 stands for that proposition. But the Government, I think, has
15 the better of the argument, and it cites to a more recent
16 Second Circuit case that says there has to be some indication
17 that the testimony from the witness who was not called by the
18 Government would have been exculpatory.

19 Here, I don't think, based on the representation of
20 the Government, and I haven't heard anything to contradict
21 that, that the testimony of Mr. Finning, or Agent Finning
22 would be at all exculpatory. If anything, it would be
23 inculpatory in many ways as to Mr. McMahon.

24 And secondly, I don't find that it is material
25 either because, as everyone knows, this issue about whether

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1 Mr. McMahon had Agent Finning do something that was contrary
2 to his duties is, as we just discussed, being offered for a
3 very limited purpose, namely to assess Mr. McMahon's intent.
4 And even on that, it is definitely peripheral evidence, I
5 would say, at best, as opposed to the evidence that has been
6 introduced that the Government will argue demonstrates his
7 intent and knowledge at the time. And that includes some of
8 his direct statements through texts or otherwise. So I just
9 don't find that there is any basis to include the instruction
10 you propose.

11 MR. LUSTBERG: Your Honor.

12 THE COURT: Yes, go ahead.

13 MR. LUSTBERG: I understand the Court's ruling, and
14 I just want the record to be clear as to why I believe the
15 testimony that Mr. Finning would have provided would have been
16 exculpatory.

17 THE COURT: Okay.

18 MR. LUSTBERG: It's one thing really only and it was
19 something that came up during the cross-examination of Ms.
20 Habeeb, which I thought was going to be predecessor to Mr.
21 Finning's testimony but turned out not to be, and that was Mr.
22 Finning would, based on his 302, have testified that at the
23 time he was, in fact, doing work on Chinese money laundering,
24 so there would have been a reason for him to pursue this
25 information other than as a favor to Mr. McMahon. And that's

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1 -- so it was for that reason -- that was why I was considering
2 calling Mr. Finning. That was the evidence that I thought
3 that we would educe. So I just wanted the record to be clear
4 before going forward so that -- so that, you know, there is an
5 understanding as to what the exculpatory nature of the
6 evidence that I was seeking was.

7 THE COURT: Well, interestingly, when I heard her
8 testify, I assumed that that's why you wanted to call Mr.
9 Finning, to elicit from him that it would be proper for him to
10 do the search if he himself wanted to start an investigation
11 of that sort. But it doesn't sound like the 302 suggests that
12 much, rather, what you just said was that he was
13 investigating, you just said now Chinese money laundering.

14 MR. LUSTBERG: Right.

15 THE COURT: And that seems different than -- I don't
16 know if this implicates Chinese money laundering, as opposed
17 to efforts to repatriate Chinese citizens. So that connection
18 is tenuous, at best, based on the 302. But even if that could
19 be considered exculpatory, I think it's still not material,
20 although I think the bulk of the evidence that would be
21 elicited would not be exculpatory in large part. So that's a
22 very thin read, I think, to rely upon. But even still, I
23 don't think it is material, because overall this issue is
24 peripheral and I'm using the language to some extent from
25 *Solomon*, the Second Circuit case cited by the Government from

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1 2002, because it really is just a very small bit of evidence
2 that the Government is going to try to argue in terms of
3 intent and knowledge, but it is overwhelmed by other evidence
4 that I just mentioned that goes to Mr. McMahon's intent and
5 knowledge. So I wouldn't allow in this instruction, which is
6 quite dramatic and would essentially tell the jury they could
7 find a negative inference based on this scintilla of
8 potentially exculpatory evidence that I don't think actually
9 is necessarily exculpatory based on the 302 recitation that
10 you just mentioned. So, for all of those reasons, I'm not
11 allowing in that instruction.

12 So that takes us back now to the equally available
13 instruction that was included. Just so everyone understands,
14 and as indicated by the bracketed if applicable, I was
15 anticipating that there might be some argument about witnesses
16 who were not called, but I think -- my suggestion is to take
17 this instruction out entirely unless someone really intends to
18 argue that someone was not called besides -- I'm sorry, Mr.
19 Lustberg, do you still intend to argue that Mr. Finning could
20 have been called?

21 MR. LUSTBERG: No, I won't argue that. But I do
22 think there have been some names that have come up pretty
23 consistently that were not called by either side, so I still
24 think that this instruction is appropriate. So I will give
25 you one example.

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1 THE COURT: No. Hang on a second.

2 If you think that, though, are you okay with the
3 instruction as worded?

4 MR. LUSTBERG: Yes. Yes.

5 THE COURT: Okay. That's fine. We will leave it in
6 as is. It says -- and oftentimes it's the defense who objects
7 -- that the parties have equal ability to call witnesses.

8 You're fine with that?

9 MR. LUSTBERG: Yes.

10 THE COURT: How about other members of the defense
11 teams, any objection to Section 19?

12 MR. GOLDBERGER: We want it in.

13 THE COURT: And Mr. Tung?

14 MR. TUNG: We want it in.

15 THE COURT: Okay. All right. So Government, do you
16 have any objection?

17 MR. HEEREN: No, Your Honor, but I would note that
18 we -- to the extent there's summation on certain -- well,
19 withdrawn.

20 I will object at the appropriate time.

21 THE COURT: Object to argument?

22 MR. HEEREN: I was thinking ahead, Your Honor. No
23 objection here, Your Honor.

24 THE COURT: Okay. Well, I prefer there not be
25 objections based on any arguments that shouldn't be made that

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1 you anticipate. Does that make sense? I mean, in other
2 words -- what are you thinking of?

3 MR. HEEREN: My concern is is that there were some
4 cross-examination questions that were sustained regarding, for
5 example, an individual named Chen Chaohong and why he wasn't
6 on trial. Obviously it depends on precisely what might be
7 said, but we would anticipate objecting to any line of
8 argument that strays into that area of who is on trial, who is
9 not on trial.

10 THE COURT: Well, I do want to caution all parties
11 that you should not be making that kind of argument, because,
12 as I was instruct the jury, it is irrelevant to them why
13 individuals who are mentioned are not on trial and that is not
14 an appropriate consideration for them. So I will trust that
15 the defense counsel aren't going to make that argument because
16 that's not proper argument.

17 MR. GOLDBERGER: Well, Judge, we need to discuss
18 this then.

19 THE COURT: Okay.

20 MR. GOLDBERGER: For instance, Mr. Chen, Chen
21 Chaohong, although he is not present as a witness, witnesses
22 in this case gave extremely important testimony about him. He
23 was the initiator.

24 THE COURT: Right.

25 MR. GOLDBERGER: So, while I understand Your Honor's

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1 charge that witnesses are equally available to both sides,
2 since the defendant doesn't have any burden of proof at all,
3 it's the burden of proof on the Government to prove guilt
4 beyond a reasonable doubt and I think it is perfectly
5 appropriate for us to, since Mr. Kuang spoke at length about
6 his conversation and they introduced yesterday that there was
7 a telephone call that went on between Chen and Kuang on the
8 day that this all took place or the day after, I think it's
9 perfectly appropriate for us to talk about Chen. He was the
10 one who instituted the entire events.

11 THE COURT: But what do you want to say about it to
12 the jury?

13 MR. GOLDBERGER: I want to say that the Government
14 has the burden of proof in terms of proving this case beyond a
15 reasonable doubt and that Mr. Chen, okay, is somebody, okay,
16 that should be a witness in this case.

17 THE COURT: No. That's exactly the opposite of what
18 my instruction is to them, is that they are to focus on the
19 evidence before them, not on what other evidence could have
20 been brought before them. So it is standard, at least to my
21 mind, to say to the jury what I am going to instruct them,
22 which is they are not to question why certain witnesses were
23 not called or why the Government didn't produce certain
24 evidence.

25 MR. GOLDBERGER: Judge, with all due respect, I have

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1 always thought that cases are decided on the evidence or lack
2 thereof, and in this case, there couldn't be a more important
3 name in the case than Chen. Kuang -- Kuang gave him full
4 credit, so to speak, for instituting the situation, number
5 one; number two, they put into evidence the fact that he had a
6 telephone call while Kuang was at the location. Now, for us
7 to not talk about Chen at all is -- I mean, does that make any
8 sense? It's like leaving out the most important part of case
9 from our point of view.

10 THE COURT: But, again, it is a question of nuance.
11 You certainly can argue that there is insufficient evidence to
12 find beyond a reasonable doubt that -- let me back up a bit.

13 You can certainly argue that you say that the
14 evidence that the Government has put forth is insufficient to
15 show whatever the proposition is, right. You can say there is
16 just not enough evidence. But what you can't do is say the
17 only way you can find if there is enough evidence is if the
18 Government called this particular witness, Mr. Chen. That's
19 not proper argument. The Government is stuck with whatever
20 evidence they put forward. But you can't suggest to them the
21 fact that they did not call Mr. Chen means that there isn't --
22 well, actually, I should retract that. They could suggest
23 that without hearing from Mr. Chen, you submit that there's
24 not enough evidence. I guess you could say that.

25 It's an interesting question. It's a fine line

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1 between saying there is not enough evidence without hearing
2 the other side of the conversation and saying that the
3 Government had a duty to call a witness. But, again, I think
4 the key is for you to focus on --

5 MR. GOLDBERGER: I don't think -- Your Honor, with
6 all due respect, I don't think it's a question of the
7 Government's duty. I think it is the question of what the
8 evidence in the case is and what the evidence shows. And what
9 the evidence clearly shows here is that the reason that this
10 conduct went on was because Mr. Chen spoke to both Mr. Kuang
11 and to my client about going ahead with this kind of conduct.
12 And without him, there is no evidence of the fact that this
13 would have been instituted at all. And, so, the fact that --
14 if Your Honor doesn't permit us to talk about Chen, I mean --

15 THE COURT: I think you're misunderstanding me. I'm
16 not saying you can't talk about Chen. Again, as I'm trying to
17 explain, if you will let me finish, is that there is a fine
18 line between saying the Government should have called this
19 witness and because the Government didn't do that, there is
20 insufficient evidence versus saying look at the evidence that
21 the Government has put before you, it's only Mr. Kuang's
22 testimony that suggests that your client Mr. Zheng is the one
23 who directly communicated with Chen or was working for the
24 Chinese Government or knew he was working for the Chinese
25 Government. That's different than saying the Government had

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1 an obligation in some way -- and I know you're not phrasing it
2 at as duty -- but you're sort of focusing on everything they
3 didn't produce and again suggesting that because they didn't
4 produce it, there's not enough.

5 MR. GOLDBERGER: Well, Judge, if we can just -- I
6 think this is really important and that's why I'm going to
7 press the issue with you, Kuang's most important testimony for
8 the Government was how this all got started.

9 THE COURT: Hang on. You don't need to explain it
10 to me. I fully understand what you're saying. I'm trying to
11 explain to you the line, I think -- and I'm acknowledging it
12 is a little difficult to parse it, but there is something
13 qualitatively different and I think proper or improper about
14 suggesting that the Government should have called Chen versus
15 saying what they have put before you is not enough, and you
16 heard this supposed evidence from Mr. Kuang but you shouldn't
17 believe him versus saying the Government should have called
18 Chen, because the Government doesn't have a duty or an
19 obligation to put on any certain type of evidence or to call
20 all the witnesses who were called as witnesses --

21 MR. GOLDBERGER: I will be glad --

22 THE COURT: You have to let me finish, please.

23 MR. GOLDBERGER: Okay.

24 THE COURT: -- to call as witnesses everyone who was
25 mentioned. I just want to make sure you don't stray into some

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1 kind of improper argument to suggest that there is a duty, and
2 I know you're trying to argue this, but the Government has a
3 duty to call every person who might have been involved in
4 this. That's really what this instruction is about. I'm not
5 saying you can't argue. Again, this is what I'm sort of
6 openly ruminating about is I don't think there is anything
7 improper about saying I submit to you that without hearing
8 from Chen you don't have enough. Maybe you can say something
9 to that effect, that Kuang isn't enough.

10 MR. GOLDBERGER: Your last suggestion seems fine.

11 THE COURT: I don't think the Government can really
12 object to that. There are two people in a conversation. The
13 Government puts forth one part of the conversation and he says
14 I say that what they've given you is not enough without
15 hearing from Mr. Chen. I'm not particularly happy about that
16 formulation. But that seems to me sort of at least an
17 argument that can be made and then you get into the equally
18 available witness charge.

19 MR. HEEREN: I think the issue is what the -- it's
20 the focus. The focus should be on the evidence. And you can
21 focus on the evidence of what is or what is not in the record
22 as it relates to Chen Chaohong.

23 THE COURT: But I think that's Government's
24 argument.

25 All I'm saying is can you make the argument and then

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1 you give the response.

2 MR. HEEREN: Fair enough.

3 THE COURT: What I don't want to do, and I will
4 instruct the jury, and anyone can say it, the Government can
5 say it, you will be instructed that the Government isn't
6 obligated to call every single potential witness and the focus
7 should be on what is before you as opposed to what is not
8 before you, and then I will give the equally available witness
9 charge. All right.

10 MR. HEEREN: Thank you, Your Honor.

11 THE COURT: Yes. We strayed into closings already.

12 So let's move on. Let me say this, I don't think
13 these issues are amenable to a very bright line division.
14 Obviously, I'll be listening to make sure it doesn't stray
15 into improper argument. What I just said now, and it seems to
16 be what Mr. Goldberger wants to argue, is I think appropriate.
17 Okay. Now, moving on, we are on page 13. Who's got
18 something next? Let's put it that way.

19 MR. HEEREN: Our next one, Your Honor, is not until
20 venue, which is Roman numeral I of the next section.

21 THE COURT: Page 16.

22 MR. LUSTBERG: I think I have one before that.

23 THE COURT: Okay.

24 MR. LUSTBERG: I'm losing track. This is actually
25 related to this last discussion. Yes, it is. This is the

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1 reasonable doubt instruction. And I actually went back and
2 looked at some prior instructions from Your Honor and the part
3 that was missing in this one was in the third -- I'm sorry --
4 the fourth sentence, which currently reads, "It is a doubt
5 that a reasonable person has after carefully weighing all of
6 the evidence."

7 In other instructions that Your Honor has provided,
8 you added the words "or lack of evidence," and I can give you
9 examples of other instructions that we have found of this
10 Court that says that. But I think it kind of goes to Mr.
11 Goldberger's point. So we would ask that those four words be
12 added at the conclusion of that sentence.

13 THE COURT: It's funny. I'm sure that where I
14 included it, it was requested by the defense because I think
15 the formulation that is here I think is the somewhat standard
16 one.

17 MR. LUSTBERG: Okay. I can tell you --

18 THE COURT: I don't have any problem including it.
19 Does the Government object?

20 MR. HEEREN: One second, Your Honor.

21 MR. LUSTBERG: I can give you the citations.

22 THE COURT: To where I have included it, you mean?

23 MR. LUSTBERG: Yes.

24 THE COURT: Like I said, I think it's because it's
25 been suggested to me. As I recall, the standard instruction

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1 probably stops at "all of the evidence."

2 MR. HEEREN: Your Honor, could we actually get the
3 citation. We have looked at the Court's fairly recent ones
4 too and I don't know that we have seen that. I'm sure Mr.
5 Lustberg has it. It would be helpful for us.

6 THE COURT: Yes.

7 MR. LUSTBERG: I do. It is a July 20, 2022 docket
8 entry in a case United States versus Burgos-Collazo,
9 20-criminal-492. I'm happy to forward it to all the parties.
10 I can tell you I picked it out because I actually mentioned it
11 in my opening and thought the instruction would be the same,
12 but either way, you're always taking your chances when you do
13 that.

14 THE COURT: Right.

15 MR. LUSTBERG: But I will forward this right now to
16 the Government as well so you have it in front of you.

17 MR. HEEREN: Thank you, Mr. Lustberg.

18 So I think the Government does object, Your Honor.
19 First, as a baseline point, as the Court noted, it is not in
20 the standard instruction that's normally given on Sand or
21 otherwise. Although I take Mr. Lustberg at his word, that it
22 was in that case; it's not one that the Court gives as a
23 matter of course either, my concern substantively, beyond sort
24 of that it's not of ordinary, is that it implies that the jury
25 can consider the absence of evidence in the sense they can

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1 consider things not in evidence, and I think that is a
2 dangerous road to go down.

3 THE COURT: I tend to agree. When I read it, and I
4 don't remember how it is I ended up including it in the
5 Burgos-Collazo case, it strikes me as incorrect in a certain
6 way because the point is to say you should consider all the
7 evidence you do have before you and decide if you still have a
8 doubt because the Government has the burden of proof. I agree
9 with Mr. Heeren, that somehow suggesting the lack of evidence
10 could easily cause the jury to speculate about what else could
11 have been gotten and that's always a danger.

12 MR. LUSTBERG: Well, let me just be clear as to how
13 I would -- why it's relevant for Mr. McMahon in particular.
14 So one thing about this case, and I think everybody would
15 agree, that with regard to Mr. McMahon it's a circumstantial
16 case in the sense that there is not a witness who's going to
17 say he or she told Mr. McMahon that he was working for China.
18 There is no statement from Mr. McMahon saying I was working
19 for China. It's a puzzle that the Government is trying to put
20 together to make that argument. And I think I should be able
21 to argue that there's no one saying that. That's a lack of
22 evidence. That's an absence of evidence.

23 This is an instruction, for what it's worth, that in
24 my career it's given in every case, but, you know, the Circuit
25 has model instructions and it's there, so I don't have to deal

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1 with this kind of discussion. But I think that that's a
2 perfectly appropriate argument to say that they didn't have
3 that.

4 THE COURT: No. So here's the problem, and it is a
5 very nuanced argument, I will acknowledge, but there is to me
6 something different about saying that the evidence the
7 Government has put forth is insufficient to demonstrate beyond
8 a reasonable doubt that Mr. McMahon had the relevant intent,
9 right, the necessary intent, versus there is a lack of
10 evidence, which almost suggests that the Government should be
11 required to put on direct evidence about it. The word lack is
12 different than insufficient. Insufficient has -- causes one
13 to focus on what is before them. Lack of evidence causes one
14 to focus on what has not put before them.

15 Now, I think you would argue those are the same, but
16 they are not, in my opinion. And I think the reason this
17 instruction, which is the standard one, and which in all the
18 other cases that the Government at least has cited back to me
19 I have followed, because it is a standard instruction, I think
20 that that's why it is phrased as such, which is you should
21 weigh all the evidence that is before you and decide if you
22 think it's sufficient to prove beyond a reasonable doubt, not
23 focusing on other things that could have been brought that
24 aren't before you or the lack of that evidence. Because of
25 course one could summarize that it would be great if they had

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1 a recording of something that Mr. McMahon said that showed
2 exactly that he -- showed directly that he knew he was working
3 for the Chinese Government.

4 So, again, I know it seems perhaps subtle, but I do
5 think there is a distinction, at least in terms of emphasis
6 and the formulation you want, and obviously I gave it once,
7 but now I would reconsider that if I focused on it further.

8 MR. LUSTBERG: Judge, I apologize that I didn't know
9 about that instruction. It was actually attached as an
10 exhibit to the original Government's proposed instructions,
11 which is how I found out about it. Just so you understand,
12 that's where I got this from. Maybe that doesn't matter. It
13 does feel like there should be a -- if that's the case, let me
14 just look at the instruction again.

15 THE COURT: You know what, it's funny, I was looking
16 at the banner. Now I realize that's the filing banner. It's
17 interesting because I'm looking at one of Judge Garaufis'
18 charges and he says you should consider all of the proof
19 presented at trial or any lack of proof in determining whether
20 you have a reasonable doubt. So this is in document 193-4,
21 which is part of the Government's attachments of jury
22 instructions given in other cases.

23 And I probably misspoke earlier when I said that the
24 cases of mine that they attached all have this construction
25 that I just mentioned, or instruction, I guess perhaps more

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1 accurately, because I was looking at the banner at the top
2 which has to do with the filing in this case. That's the ECF
3 banner.

4 So I can't say categorically, but it does seem to
5 me, based on my own recollection, that I typically follow the
6 standard instruction. And being forced now to think about
7 that particular wording, I do find that there's a difference,
8 especially if it ends with or lack thereof.

9 Lack of proof is --

10 MR. HEEREN: So, Your Honor, to the extent it gives
11 any comfort, for lack of a better word, there is in the -- in
12 Section 11 that talks about the lack of duty to call
13 witnesses, to produce evidence, and so forth, there's a more
14 clear discussion of reasonable doubt and talks about how
15 reasonable doubt can arise from a lack of evidence and talks
16 about sort of the -- does a more thorough job of explaining
17 the issue you're sort of discussing with us right now. So you
18 don't need to import it again into the reasonable doubt
19 standard. So I guess for whatever it's worth, the point is
20 made elsewhere that reasonable doubt can arise from a lack of
21 evidence put forth by the Government and that sort of gets to
22 where we are talking about.

23 THE COURT: Although that could cut the other way,
24 which is why not then include that where we are talking
25 specifically about reasonable doubt.

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1 I don't think there is anything that magical about
2 including it, to be honest, because obviously the defense can
3 argue there simply is insufficient or a lack of evidence to
4 prove guilt beyond a reasonable doubt.

5 MR. HEEREN: And, Your Honor, just to answer that
6 question, it's because the particular phrasing in the
7 reasonable doubt section is doubt that a reasonable person has
8 after carefully weighing all of the evidence.

9 THE COURT: Right.

10 MR. HEEREN: And that's the key phrase, is the
11 weighing. And that's different, right, because it's referring
12 to what was considered in the case. And it may not be enough
13 evidence; it may be insufficient, but you're not weighing what
14 could have been there.

15 THE COURT: I think at the end of the day I'm going
16 to stick with the formulation that appears to be the more
17 traditional standard one. And certainly I think is the one
18 probably in Sand, I'm guessing. I don't remember what the
19 origin of that one is. I'm going to leave it as is I think
20 for the very reason that Mr. Heeren stated. I think, as I
21 said before, it may be a subtle difference, but emphasis
22 should be on what is before them, what evidence is before them
23 and not what evidence could have been before them and is not.
24 I'm going to leave that as is.

25 But as the Government notes, there is a reference

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1 earlier to the fact that a lack of evidence could contribute
2 to reasonable doubt in the prior section. And certainly the
3 defense is free to make that argument.

4 And, finally, I guess I would say I don't think that
5 change is going to -- certainly I don't think it prejudices
6 the defendants in any way, but I would prefer to have the jury
7 focus on what is before them, especially given the nature of
8 some of the arguments that I think will be made.

9 All right. So I'm going to overrule that objection.

10 Let's go beyond a reasonable doubt. What's the next
11 comment or suggestion?

12 MR. HEEREN: The next item, Your Honor, is the venue
13 instruction. I guess starting at a high level, I don't
14 believe there is any objection to venue at the close of the
15 Government's case, so I think at this point there doesn't need
16 to be a venue instruction.

17 THE COURT: Is anyone going to argue that venue is
18 lacking here?

19 MR. LUSTBERG: We certainly filed pretrial motions
20 addressed to venue, which the Court denied.

21 THE COURT: Well, I have heard evidence that would
22 establish venue. I think there was some effort to establish
23 that Mr. McMahon's account, for example, might have been in
24 the Eastern District or maybe monies were paid from the
25 Eastern District, and then I think Mr. Zhu, he lives in

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1 Flushing; correct? Wasn't this lawyer from Flushing, Ms. Shi?

2 MR. HEEREN: She was, yes.

3 THE COURT: Okay. And then as to Mr. Zheng.

4 MR. GOLDBERGER: Mr. Zheng picked up Mr. Kuang in
5 Flushing.

6 THE COURT: Right. So, it's up to you, folks. You
7 can still argue it, but I think there has been evidence enough
8 for venue since venue need only be proved by a preponderance.

9 And then there all of the people coming through the
10 airport as part of the alleged conspiracy.

11 MR. LUSTBERG: I'm okay with omitting it.

12 THE COURT: Okay. So long as no one is arguing it.
13 Obviously if someone raises it in their argument, then I will
14 instruct them, but less is less when it comes to instructions
15 and the jurors will be happy. We will take out the --

16 MR. LUSTBERG: I will note, Your Honor, there is the
17 interstate element of the stalking statute that we will talk
18 about later, which has the same thing. Part of my thinking in
19 which it should be eliminated is because it is sort of
20 duplicative and maybe confusing because there it's an element
21 that has to be proven beyond a reasonable doubt and here it is
22 a preponderance, so I think the Government is right by
23 omitting it here.

24 THE COURT: Right, especially because they may
25 confuse what the standard is with respect to interstate

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1 stalking.

2 MR. LUSTBERG: Exactly.

3 THE COURT: I think that's a fair point. Good
4 point.

5 So, going on, anything else?

6 MR. HEEREN: To venue, if we have to raise it, there
7 is some language we would want to propose, but I think since
8 it sounds like it is unlikely to come up, we can table that
9 since I think it would be a fairly quick discussion with the
10 Court if we had to have the language.

11 THE COURT: Are you sure you don't want to at least
12 preview it so that we can insert something quickly?

13 MR. HEEREN: Sure, whatever the Court wants.

14 THE COURT: So what would be the edits you would
15 propose?

16 MR. HEEREN: In paragraph two, I think the language
17 might have gotten a little jumbled. The way I would rewrite
18 the sentences is it would begin the same, which would be "To
19 establish that venue for a charged crime is appropriate in the
20 Eastern District of New York, the Government must prove that,"
21 we would add "some act in furtherance of their crime occurred
22 here," period.

23 And then the next sentence would begin "Even if
24 other acts were committed outside this district or if the
25 crime was completed elsewhere, and then you would add "venue

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1 is established," and then it would continue in the -- as is,
2 "so long as some act in furtherance of the crime took place in
3 this district." It is a little bit repetitive but it makes it
4 clear.

5 THE COURT: I'm not sure that makes any substantive
6 difference.

7 MR. HEEREN: No. The way it was currently written,
8 I think two sentences got merged and it was a little
9 confusing.

10 And then there is another substantive sentence after
11 that.

12 THE COURT: It's funny, I mean, to me the sentence
13 reads just fine. It is a little long, but I think it
14 communicates the thoughts accurately and fully. I don't
15 really mind breaking them up.

16 Does anyone on the defense side care if we break it
17 down into three separate sentences?

18 MR. LUSTBERG: No, Your Honor.

19 MR. TUNG: No, Your Honor.

20 MR. GOLDBERGER: No.

21 THE COURT: All right. So we will get those from
22 the Government after this in case we need to reinsert the
23 venue instruction.

24 Go ahead, Mr. Heeren.

25 MR. HEEREN: And then the one additional sentence to

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1 add to that would be "In a conspiracy," comma, "actions of
2 co-conspirators, as well as actions caused by co-conspirators,
3 are sufficient to confer venue if it was reasonably
4 foreseeable to the defendants that the acts would occur in the
5 Eastern District of New York.

6 THE COURT: All right. So you have put it down for
7 the record.

8 Any objection to that addition if we ended up using
9 the venue instruction, Mr. Lustberg?

10 MR. LUSTBERG: No, Your Honor.

11 MR. GOLDBERGER: No, Your Honor.

12 MR. TUNG: No, Your Honor.

13 THE COURT: Let's hope we don't have to. We will
14 have the transcript if we need it for that change.

15 Do you want to lengthen this one further?

16 MR. HEEREN: No, Your Honor.

17 THE COURT: It's an awful lot on a somewhat
18 uncontroversial proposition. It's not your fault. It started
19 off long.

20 MR. HEEREN: Sometimes it's quite controversial.

21 No, Your Honor. There is some typo stuff, but it is
22 not worth getting into.

23 THE COURT: Let's move ahead and assume for the
24 moment this issue won't arise since no one intends to dispute
25 venue.

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1 Next comment.

2 MR. HEEREN: The next for the Government is in
3 Section 3B, intentionally.

4 THE COURT: Yes, on page 18.

5 MR. HEEREN: And, so, just to parallel the language
6 in the section above A, I think we should say, "A defendant
7 acts intentionally" because the sentence above says, "A
8 defendant acts knowingly." I'm also fine with a person acts
9 knowingly and a person acts intentionally, whichever it is,
10 just that that's the same.

11 THE COURT: Parallelism.

12 Does the defense care either way?

13 MR. LUSTBERG: I think it is probably a good idea to
14 be parallel, but I don't care.

15 THE COURT: How about just a person for both of
16 them? "A person acts knowingly" under the knowingly section
17 and "a person acts intentionally"?

18 MR. HEEREN: That's fine, Your Honor.

19 THE COURT: All right.

20 MR. HEEREN: The next change is to shorten this
21 again. The second paragraph under "intentionally," which is
22 the point about state of mind being inferential, there is a
23 similar but not identical sentence at the end of the
24 paragraph, at the end of the conscious avoidance section. And
25 what the Government would propose is taking the one -- the

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1 paragraph from the intentional section, so the second
2 paragraph under "intentionally," and moving that to after the
3 "conscious avoidance" paragraph and striking the second
4 version of that that exists in the "conscious avoidance"
5 paragraph.

6 THE COURT: Okay.

7 MR. HEEREN: Does that make sense?

8 THE COURT: It does, except for the fact I didn't
9 quite follow where you were. Where is the portion you would
10 move? How does it start?

11 MR. HEEREN: So, it's in the second paragraph under
12 "intentionally" and it begins "The issues of knowledge and
13 intent require you" --

14 THE COURT: I see exactly what you're saying. My
15 apologies for cutting you off. I see exactly that these two
16 are the same. You would remove the first par of --

17 MR. HEEREN: I would just take that entire paragraph
18 and move that to after the "conscious avoidance" paragraph,
19 the first paragraph under "conscious avoidance."

20 THE COURT: And replace that one?

21 MR. HEEREN: Correct, because the second one, it is
22 actually shorter and not quite as helpful.

23 THE COURT: I think that make sense. Does anyone
24 object to that?

25 MR. LUSTBERG: One moment.

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1 THE COURT: Just so it's clear, it would be a
2 wholesale supplanting of the second paragraph under
3 intentionally with respect to the second paragraph under
4 conscious avoidance, one would replace the other.

5 MR. LUSTBERG: I agree that it should only be in one
6 of the two. They seem very similar.

7 THE COURT: They are almost identical. One could
8 sit here and figure out what the additional sentence is. I
9 know that the second sentence in the "intentionally" paragraph
10 is not in the "conscious avoidance" section.

11 MR. LUSTBERG: I'm okay with Mr. Heeren's proposed
12 change.

13 THE COURT: All right. So any objection, Mr.
14 Goldberger or Mr. Tung?

15 MR. TUNG: No.

16 MR. GOLDBERGER: No.

17 THE COURT: So we will make that change. We will
18 replace the one on page 19 with the one on page 18.

19 MR. HEEREN: For whatever it's worth, I think that
20 that paragraph is relevant to all of the knowledge and intent
21 points anyway, so I think it makes sense that it comes after
22 all three of those instructions.

23 THE COURT: I think that's right. All right.
24 Anything else from the Government?

25 MR. HEEREN: Not until conspiracy, Section 5A.

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1 THE COURT: You realize that's the next page, right?
2 I get all excited when you say not until. It's the next page.
3 Does anyone have anything before that?

4 MR. LUSTBERG: No.

5 THE COURT: Now, we are looking at page 20.

6 MR. HEEREN: Under conspiracy generally, the second
7 paragraph that begins a conspiracy is an agreement by two or
8 more persons, there is -- after the sentence "A conspiracy is
9 in and of itself a crime," we would propose to add if a
10 conspiracy exists, even if it fails to achieve its purpose, it
11 is still a punishable crime.

12 THE COURT: Okay. I think that is certainly
13 expressed elsewhere, because I know I've seen that language.

14 Am I wrong? I thought we had that somewhere else.

15 MR. HEEREN: I think it was in our proposal and it
16 may have fallen out. I could be wrong.

17 MR. LUSTBERG: That's one I saw myself as well.

18 THE COURT: Maybe look up purpose or achieve, Kate,
19 and see if you can find it.

20 Maybe you're right. I don't know how I would have
21 read it then.

22 Yes, we will put that in there. So the additional
23 sentence is "If a conspiracy exists."

24 MR. HEEREN: Yes.

25 THE COURT: "Even if it fails to achieve its

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1 purpose, it is still a punishable crime," and that follows, as
2 you know, Kate, after a conspiracy is in and of itself a
3 crime.

4 Any objection to that?

5 MR. LUSTBERG: No.

6 MR. GOLDBERGER: No, Your Honor.

7 MR. TUNG: No, Your Honor.

8 THE COURT: All right.

9 Mr. Heeren, anything else? I'm going to go to you
10 now because at some point someone is going to sneak in one.
11 Right now you're leading the pack.

12

13 (Continued on next page.)

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1 (In open court.)

2 MR. HEEREN: I do go a few pages further ahead.

3 THE COURT: Be still my beating heart.

4 MR. HEEREN: It's the aiding and abetting section.

5 THE COURT: Okay. Page 25. Anything before then?

6 Page 25.

7 MR. HEEREN: You have to flip back and forth here
8 to make sure I know where I am. It's a typo in the
9 paragraph that begins, to establish that the defendant
10 participated in the commission of the crime. This is
11 probably the next line.

12 THE COURT: On Page 26, yes. To establish that
13 the defendant knowingly associated themselves.

14 MR. HEEREN: The paragraph immediately before
15 that, your Honor.

16 THE COURT: Okay.

17 MR. HEEREN: The sixth line in that Paragraph 1
18 who has knowledge about crime is being committed or is about
19 to be committed little typo.

20 THE COURT: Wow that is impressive.

21 MR. HEEREN: I don't actually think I made that
22 edit.

23 MR. LUSTBERG: I think it fall into the category
24 of you better get a life.

25 THE COURT: The thing is when I read it I pick it

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1 up so it's better we get it now.

2 MR. HEEREN: In the bullets, it has it in plural.
3 The first bullet is singular, as something he wished to
4 bring about. And the next are in the plural, themselves and
5 their. I think it should be himself and his actions because
6 they are considering this on an individual basis about each
7 defendant.

8 MR. LUSTBERG: I agree.

9 THE COURT: It's interesting because I think there
10 is a movement to make all of these -- right?

11 MR. HEEREN: I'm also fine with they and them, too
12 if we're doing they and them throughout.

13 THE COURT: We'll stick with the more conservative
14 did he knowingly associate himself because at least it
15 starts off as singular but whatever. Okay.

16 Did he seek by his actions? We'll make those
17 changes.

18 Anything after that? Or what's after that?

19 MR. HEEREN: The next one is the withdrawal
20 instruction and I think the Government's -- has opposed the
21 instruction.

22 THE COURT: Now, let's talk about this. The
23 Government's objection is based on the fact that they don't
24 believe there is sufficient evidence to warrant this
25 instruction, so let me hear from Mr. Zheng's counsel on this

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1 because it be honest when I included this it's because I
2 assumed that Mr. Zheng was going to testify in part based on
3 the opening. And then in part based on what was I think an
4 initial response that Mr. Zheng might testify so that's why
5 we included it. At this point, I don't know what the
6 evidence is that would support a theory of withdrawal from
7 the conspiracy by Mr. Zheng.

8 MR. GOLDBERGER: Well, certainly, the second trip
9 by himself where Kuang was not with him the next day where
10 he goes up to the home again whether or not he took or he
11 didn't take the note off the door.

12 THE COURT: Well, there's no evidence he did and
13 the evidence suggests that.

14 MR. GOLDBERGER: Actually there is, Judge.

15 THE COURT: You really do have to let me finish
16 just for the Court reporter's sake. So all I was saying is
17 there was evidence indicating that the note had been taken
18 down by then but go ahead.

19 MR. GOLDBERGER: As I recall, he did get in touch
20 with Chen.

21 THE COURT: Who is he?

22 MR. GOLDBERGER: I'm talking about the defendant.
23 He got in touch with Chen and told him that he had taken
24 down the note.

25 THE COURT: So you're saying through their

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1 cooperating witness, there's testimony that the cooperating
2 witness heard your client call Mr. Chen and say he took down
3 the note? I don't recall that testimony, but I don't have a
4 perfect recall as to the record.

5 MR. GOLDBERGER: The Government made a statement
6 or part of a statement --

7 THE COURT: Postarrest.

8 MR. GOLDBERGER: -- that Mr. Zheng made.

9 And during that statement, a portion of it
10 indicates that he did call Mr. Chen and he took down the
11 note and I think that that's appropriate for us to argue
12 that he withdrew from the conspiracy.

13 THE COURT: Okay.

14 MR. GOLDBERGER: At that point.

15 THE COURT: I do recall something in his
16 postarrest about that.

17 So if that's true, and I'm turning now to the
18 Government, why shouldn't the defense be able to argue
19 withdrawal from the conspiracy even if the Government is
20 going to argue that that was impossible since a note had
21 been taken down. I assume you're going to argue that that
22 was a false exculpatory statement.

23 MR. HEEREN: We are going to do that, your Honor.
24 It is a false exculpatory statement.

25 THE COURT: I suspect the problem is if it isn't,

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1 it's hearsay. In other words, it's being offered for the
2 truth that he actually did those things.

3 MR. GOLDBERGER: If I may, Judge?

4 We do have a film, tape, of him going by himself
5 not with Kuang the next day. Now, whether he whether or not
6 he took something down or he didn't he has something in his
7 hand and to could be argued that it's a note or it may be
8 argued that it's a telephone, it could be argued a lot of
9 things. But after he's arrested, they played part of the
10 statement that he made and what was allowed to be played,
11 and has already been played for the jury, is that he did
12 call Chen.

13 And by the way, I think what's supported there in
14 terms of him calling Chen is that he volunteered to the
15 Government to call Chen and tape record any conversations
16 that he had with him then but he certainly called Chen to
17 let him know, he said this, that he had taken down the note
18 and was not a part of this anymore and I think that's
19 clearly we should be permitted to argue withdrawal.

20 The Government can be permitted, I think,
21 obviously, we'll argue that he didn't withdraw from the
22 conspiracy, that it was already completed, it was that it's
23 a lie, that he took down the note. They can argue whatever
24 they want, but I think we should be at least allowed to make
25 the argument.

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1 THE COURT: Well, let me say I think your
2 co-counsel is whispering to you.

3 One is I think the part about him offering it make
4 recorded conversations with Chen didn't come in that was he
5 can included and secondly, and I don't actually know the
6 answer to this but it's interesting to me that the
7 Government offered, or I presume, allowed in that portion of
8 the tape to argue false exculpatory that it's evidence of
9 his consciousness of guilt because he lied to the agents
10 about having taken down the note or having called Chen and
11 telling Chen he took down the note, I guess, either of those
12 being lies allegedly.

13 If they're not false exculpatories, though, then
14 it would seem to me as I said a moment ago to be hearsay
15 vis-à-vis the defendant because they're offered for their
16 truth, namely, that he took down the note and they are
17 out-of-court statements so normally they wouldn't be
18 admissible because they're hearsay.

19 But, yes, the Government put them in for their own
20 purpose. The question is whether or not you can argue to
21 the jury that they should consider them for their truth when
22 they're actually not admissible for their truth. A did
23 there ever come a time own statement saying I did X, Y, or Z
24 can't be offered to show that he actually did do that.

25 So I don't think you can argue to the jury that

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1 they should consider that for its truth which puts a bit of
2 a dent in your withdrawal argument.

3 MR. GOLDBERGER: I'm not sure I understand, Judge.
4 The Government allowed that portion, I mean, they could have
5 objected and said just what your Honor is saying now, but
6 they allowed and without any problem that it be played.

7 THE COURT: To use to for a non-hearsay purpose,
8 namely, to show consciousness of guilt because they lied.
9 They're saying it can't be offered for its truth. It can
10 only be offered as evidence of him lying to agents which is
11 an indication of his guilty conscience. That's the purpose,
12 the admissible purpose of this. The inadmissible purposes
13 of this is to argue that they're true, that he took down the
14 note.

15 MR. GOLDBERGER: Excuse me, Judge, there was never
16 any argument on the Government's part that that statement
17 that he made was false. That statement that he made about
18 calling Chen was false.

19 THE COURT: Well, they haven't made the argument
20 yet because summation hasn't been made yet. The Government
21 will tell me, why did you allow in or play that portion of
22 the tape? And I don't remember if this is part of the
23 compromise with your allowed to in under completeness.

24 MS. CHEN: Your Honor, we did not we preserved our
25 objection as to completeness and does for the exact reason

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1 that you identified that it was part of the clip that was
2 played. It was part of the false exculpatory which would
3 again not be offered for its truth. For example, in other
4 portions of video, defendant Zheng states he never posted
5 the note on the door.

6 Again, that's obviously not being offered for the
7 fact that defendant Zheng did, in fact, did not post the
8 note on the door. It's precisely for guilty state of mind
9 and so to allow it to be offered for it's truth would not
10 have any hearsay exception, I don't think there is a hearsay
11 exception that's available here.

12 THE COURT: So it is straightforward legal
13 principle that you cannot argue that it -- that the jury
14 should consider it for its truth because that clearly is
15 hearsay, that's the problem. He can't offer up his own
16 exculpatory statement that was made out of court. So if
17 that's the case when all you're left with is him going back
18 to the house the next day which is in and of itself
19 equivocal, obviously.

20 MR. GOLDBERGER: Let me ask the Court a question
21 then. The Government is going to argue, then I assume
22 because that's that are saying why they put it in is that
23 that was a false exculpatory. Am I not permitted to argue
24 that the Government is wrong? If they're going to make that
25 argument, and that's why they put it in, why do I not have

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1 the right to say I think the Government's argument is
2 incorrect.

3 THE COURT: Right. That I think is fair because,
4 obviously, if the Government wants to use it as a false
5 exculpatory, the defense should be allowed to argue that
6 it's not false. If you get to that point, then, can it be
7 considered for its truth because that would be the obvious
8 implication that it's true.

9 MS. CHEN: I think, your Honor, the argument is, I
10 admit, this is quite nuanced. The argument would be that
11 the statements made by defendant Zheng actually are not
12 indicative an am guilty state of mind. Not that the
13 statement itself was true, that would be the counter
14 argument to the reason it's being offered by the Government.

15 THE COURT: Say that again.

16 MR. GOLDBERGER: I didn't quite understand that at
17 all.

18 THE COURT: You lost me on that.

19 MS. CHEN: So the Government, as articulated, is
20 intending to offer that statement as a false exculpatory as
21 to the defendant's Zheng state of mind I think counsel.

22 THE COURT: Hang on. The false exculpatory being
23 that he didn't take down the note. He didn't go back to
24 take down the note.

25 MS. CHEN: Correct. Well, yes, I think that's

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1 right.

2 MR. GOLDBERGER: Judge, the.

3 THE COURT: You know, hang on, I think at the end
4 of day, given the state of the evidence and the fact that
5 whatever the Government argues about that statement, which I
6 assume is going to be along the lines of you shouldn't
7 credit that. There's no evidence or not no evidence but you
8 shouldn't credit his statement that he went back to the
9 house the next day for that purpose that's really what you
10 want to argue, right.

11 I think if that's the case, the defense ought to
12 be able to argue the converse because they're just trying to
13 rebut the evidence you're trying to put in which leaves you
14 with getting in what would otherwise be inadmissible
15 hearsay.

16 MR. HEEREN: So, just to clarify, your Honor. I
17 don't think that's what our argument is. Our argument is
18 that not what you shouldn't credit it. It's that this is
19 affirmative, a false statement, that shows a guilty mind,
20 right, which is different than saying don't credit it,
21 right? It is a provable lie based on other facts.

22 MR. GOLDBERGER: I'm not sure I understand, Judge.

23 The Government plays the tape of him going back to
24 the house, all right? I don't know what they're going to
25 say as to why he went back to the house by himself without

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1 Kuang. But I think it's a reasonable supposition that the
2 reason he went back to the house is the reason that he said
3 he went back to the house which is that he went back to the
4 house to take down the note.

5 However, the note was there, or not there or what
6 he did, what he didn't do is in the evidence. It's in the
7 pictures. So they can argue whatever they want. I think
8 it's certainly fair for me to argue to the jury he went back
9 because he didn't want to be a part of this anymore and he
10 went to take down the note. He was there for a few seconds,
11 he went to the door. And I remember from the tape, he
12 turned and left. So he either took the note or he didn't
13 take the note and they can argue what whatever they want. I
14 should be able to argue, they put it into evidence.

15 THE COURT: No, I think the difference from an
16 evidentiary standpoint is that, and maybe to remove it from
17 this context let's just suppose it's a question about
18 shooting someone or not shooting someone and the question
19 becomes: Why did the person shoot them?

20 The Government wants to say that Mr. Kuang is
21 going to affirmatively lie about why he went back to the
22 house. I don't think he's necessarily going to lie about
23 going back to the house but I don't know what the Government
24 has argument is.

25 What the Government saying is that his attempt to

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1 throw the agents off the track as to the why is some
2 everyday of consciousness of guilt whereas you want to argue
3 that it is true, that that's why he went back.

4 So it's, well, actually I guess how yeah
5 Mr. Heeren. Let me go back. You're correct that he's
6 affirmatively lying that is your argument. But the problem
7 is if the defense wants to argue, no, it's not a lie, he
8 didn't affirmatively lie, don't you end up back in the same
9 place that the jury should believe that it was a true
10 statement.

11 MR. HEEREN: I don't think so because then it
12 becomes hearsay, right? And I know that sounds weird, but
13 the point is, is that if it happens to be the case that in
14 this circumstance the lies that he told are directly related
15 to the actions that defense counsel cares about. There are
16 circumstances where a person would lie in a material way in
17 an interview and you would say: These are lies and those
18 lies in the interview show their guilty state of mind. And,
19 theoretically, defense counsel could say they weren't lies
20 but then they can't go further and say, you should believe
21 those statements and rely on them for X, Y, and Z reasons.

22 MR. GOLDBERGER: Judge, if I may?

23 What is the Government going to argue about the
24 fact that, very clearly, he went back to the house the next
25 day by himself and went to the front door.

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1 THE COURT: They're going to argue there's no
2 evidence as to why he went back. And so, you shouldn't
3 conclude anything, I assume.

4 MR. GOLDBERGER: What are they going to argue?

5 THE COURT: That's what I'm saying.

6 MR. GOLDBERGER: They're going to argue that he
7 just decided to take another trip to New Jersey?

8 THE COURT: Well, the Government makes a "who
9 knows why," but it doesn't relate to why he was there the
10 day before and so disregard it, I assume. I shouldn't be
11 speaking for the Government but that's why I assume they
12 will argue.

13 MR. GOLDBERGER: That doesn't make any sense,
14 Judge, to make that argument. He you went back for no
15 reason at all.

16 THE COURT: It's not that. It's just a question
17 the jury can't decide what the reason was. There wasn't
18 sufficient evidence about it. It can't be used for the
19 purpose you want because it isn't enough to show he withdrew
20 from the conspiracy which is what you would like to be able
21 to argue. Right now, what we're arguing about is the
22 Government's position that you don't even have enough
23 evidence in the record. Admissible, competent evidence in
24 the record to own make the argument that he withdrew from
25 the conspiracy.

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1 I don't know if the Government's going to argue
2 about him being back, it can just be a nothing, a question
3 mark, that never gets answered and it's irrelevant I guess
4 the Government could argue.

5 But focusing on the point that is being raised
6 here is: What is the evidence that he withdrew from the
7 conspiracy? Right now what you have is him going back the
8 second day to the same house and the statement he made to
9 the agents which the Government seeks to admit is a false
10 exculpatory. And the quandary, I think, I'm grappling with
11 is given that that's the admissible purpose, or the proper
12 purpose for admitting it, I don't think I can let you argue
13 to the jury that they should accept it as true, it's
14 improper.

15 MR. GOLDBERGER: There was other evidence, Judge,
16 as I recall from Kuang himself who was there on the first
17 day that there was a call or a conversations about taking
18 the notes down. And as your Honor may recall, there was a
19 second quick trip back in the car to go back to the house.

20 THE COURT: But it was to take down two of the
21 three, not to take all of them down. And there was
22 testimony that they did that because it was too much or
23 something like that.

24 MR. GOLDBERGER: But, Judge, you're preventing
25 from arguing that, since there was a third note there, that

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1 he wasn't back home the next day by himself without Kuang
2 and going to the front door where the note was.

3 Now, what is the Government has argue as to what
4 he was doing he was what sightseeing. Doesn't make any
5 sense that he would go back there if it didn't have
6 something to do with the note. Why would he do it? I mean,
7 logic is that he went back to take the note back maybe he
8 did, maybe he didn't. But then they could argue whatever
9 they want. I certainly should be able to argue that that's
10 what he was going back for.

11 THE COURT: Yes, go ahead.

12 MS. CHEN: Your Honor, just to clarify what the
13 evidence actually showed, Mr. Kuang testified that before
14 they even left the house the first time, two notes were
15 taken down because they were too obvious and could be
16 spotted by neighbors amongst other things. Then Mr. Kuang
17 and defendant Zheng left and were asked to return to take
18 photos of the notes, defendant Zheng there's testimony that
19 defendant Zheng added another piece of tape, videos were
20 taken, and then they left.

21 There was additional testimony by Zhu Fong that
22 she and Xu Qin took the note down and there is evidence of
23 the notes because we have the notes and they've been
24 admitted into evidence and each kind of individual who
25 interacted with the notes testified as to the fact that that

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1 was the note that was taken down.

2 I believe Mr. Kuang as to the ripped-up notes
3 said, yes, those were the notes that defendant Zheng the two
4 notes that he took down originally and so there is no actual
5 evidence that September 5th the morning that I believe
6 defendant Zheng returned to the home there was a note there
7 and there was a note, in fact, taken down.

8 MR. GOLDBERGER: Your Honor, let me just finish
9 because in my mind, this is not making any sense. The
10 defendant went back to the home on the second day. That's
11 clearly the everyday in the case. Pause we all saw it.

12 Now, the jury saw that, okay. And now, there is
13 that's evidence in this case that he went back to that home.
14 They can argue whatever they want as to why he went back I
15 have to be since it's evidence in the case, I have to be
16 allowed to present an argument as to why I think he went
17 back to the home and what I think the evidence shows. They
18 can argue whatever they want as to -- I don't think I've
19 heard an argument from them as to, yeah, as we sit here now
20 as to why he went back or why they think he went back and I
21 think I should be at least allowed to argue about why here
22 is a man who was back this on his own by himself and he goes
23 back to the house and he goes up to the door now, the jury
24 can come to whatever conclusions they want as to why he went
25 back. They may accept the Government's argument, they may

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1 accept my argument but I've got to be able to make that
2 argument it's part of the evidence in the case.

3 THE COURT: The question, though, when it comes to
4 jury instructions, though, and the law is whether or not
5 there's sufficient evidence to justify the giving of an
6 instruction. And really what I was trying to do just now is
7 to have both sides explain what the evidence is and
8 primarily to have you explain Mr. Goldberger what evidence
9 you have that you say justifies this withdrawal instruction
10 and as best I can tell is it this act of going back to the
11 house the next day because I'm more convinced that you
12 should not be allowed to argue the truth of his statement
13 that he went back for the purpose of, or actually, did go
14 and get the note which is fairly demonstrably not true, but
15 that he went back to get the note. That shouldn't be argued
16 because you can't argue the truth of his statement to the
17 agents that was made out of court.

18 But I actually do think that the evidence that he
19 went back to the house I don't know if I would say
20 inexplicably but there's no evidence to say that it was
21 related in some way to the conspiracy because the
22 Government's evidence is that the conspiracy or the act in
23 furtherance thereof was done on the day before.

24 I do think you get to argue withdrawal based on
25 that. Even though I think it's a close call whether or not

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1 it's sufficient but it is a fact that has been established
2 to with some evidence and I think you should be allowed to
3 article that.

4 So just to draw the lines carefully about what you
5 can argue based on and what you can't is you can't suggest
6 to the jury that his statement that he went back for that
7 purpose, which he made to the agents out of court, is true.
8 The Government's obviously going to be allowed to use it for
9 the purposes of establishing a false exculpatory now but you
10 can't argue the truth you have to. But you can argue the
11 evident about him returning to the house the next day and
12 make your argument about withdrawal based on that.

13 So I will include this instruction and allow both
14 sides to make the argument for and against withdrawal of the
15 conspiracy.

16 MS. CHEN: Your Honor, this instruction will be
17 included the Government does have an addition in the preview
18 beginning, for example.

19 THE COURT: Okay.

20 MS. CHEN: I believe the sentence currently reads,
21 a defendant may withdraw from a conspiracy by wholly
22 depriving. We would add by giving a timely warning about
23 the conspiracy to proper law enforcement officials or wholly
24 depriving his prior efforts of effectiveness in the
25 commission of the crime in the rest of the sentence remains

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1 the same. And that was taken from your Honor's instruction
2 recently in full play as well as in the stand instruction as
3 well.

4 THE COURT: Right. I wonder, though, if this
5 whole, for example, section should be taken out only because
6 I think it's not going to be exhaustive but you have I don't
7 have any problem including that because it's one way in
8 which a conspirator can do that.

9 Mr. Goldberger, do you have any objection or
10 Ms. Wong?

11 MR. GOLDBERGER: I'm just reading it now, your
12 Honor, just give movie a minute, please.

13 THE COURT: When it tracks Sand that's true the
14 sentence is to give examples and, like I said, it's
15 imperfect at best because it can never be exhaustive. It
16 can be a little more complete.

17 MR. GOLDBERGER: My only thought, Judge, is I
18 should be able to argue withdrawal based on prior
19 conversation and I don't think that in order to for the
20 defendant have withdrawn from the he has to notify the
21 police.

22 THE COURT: No, but remember this is just an
23 example paragraph says, for example, he may withdraw by
24 doing this, this, or this. But you can argue that that's
25 not the only way. Evenly not quite sure how you're arguing

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1 to but I assume it's more along the lines of depriving his
2 prior efforts of effectiveness. That would be your argument
3 but that's in there as well. So I don't think there's any
4 problem with giving another example. It's not meant to be
5 the necessary means but a means.

6 MR. HEEREN: And your Honor, just to be clear, I
7 think the reason why those examples are in there is to make
8 clear to the jury the quality of conduct that's needed to
9 constitute withdrawal, right?

10 And so, I do think and I don't think this would be
11 surprising the Government plans to assertively argue that
12 simply returning to the scene of the crime is not anywhere
13 near what's required for true withdrawal. And those
14 examples and the rest of the instruction are important to
15 making that point.

16 THE COURT: No, I do think that they are
17 instructive will illuminating so I'm going to include that
18 additional example which is giving timely warning to law
19 enforcement or whatever was said, my law clerk had it down.
20 Then it would be whole by wholly depriving his prior efforts
21 every effectiveness or by doing acts that are inconsistent
22 with the objects of the conspiracy. Which obviously is a
23 basis upon which you can argue, Mr. Goldberger that he
24 withdraw.

25 MR. GOLDBERGER: Yes, your Honor.

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1 THE COURT: All right. Anything else with regard
2 to that instruction?

3 From the Government?

4 MR. HEEREN: No, your Honor.

5 THE COURT: Okay. From Mr. Goldberger?

6 MR. GOLDBERGER: No, your Honor.

7 THE COURT: Any other defendant, I assume?

8 MR. LUSTBERG: No, your Honor.

9 MR. TUNG: No, your Honor.

10 THE COURT: All right. Now we have to go to the
11 multiconspiracy objection unless the Government has
12 something else to talk about. The.

13 MR. HEEREN: Our next one is a typo in Count One
14 so I think not.

15 THE COURT: Okay. Page.

16 MR. HEEREN: Well, I think the multiconspiracy
17 probably does come next, your Honor.

18 THE COURT: Okay. Right. Exactly. So it will
19 probably if right after this multi, sorry, after the
20 withdrawal from the conspiracy instruction and let me call
21 up what was suggested my Mr. Lustberg and Ms. Conti.

22 MR. LUSTBERG: I think was verbatim from Sand.

23 THE COURT: Yes. And so, so my reaction to the
24 proposed instruction was that it was fine but I know the
25 Government objects and wants me to do a far slimmer, leaner

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1 version which I have used before at least twice which
2 doesn't mean that I'm wedded to that construction, I don't
3 particularly want too use the one I've used before. I feel
4 that the defense now that I'm comparing them side by side is
5 still much more so on the charge conspiracy. So, for
6 example, in the one that I've used before that the
7 Government recites is its filing yesterday, I think or today
8 actually, today. If you look at the second paragraph, it
9 talks about two people joining to form a conspiracy and then
10 by contrast multiple conspires exist when there are separate
11 unlawful agreements to achieve distinct purposes. But then
12 it goes back to talking about single conspiracy despite
13 changes in personnel, et cetera.

14 And then it further says, The fact that members of
15 a conspiracy may change does not necessarily imply that
16 separate conspires exist. A single conspiracy is not
17 transposed into multiple conspires. And then it has a
18 concluding sentence of, On the other hand, if you find that
19 a conspiracy charged in the indictment did not exist, you
20 cannot find any defendant guilty of that conspiracy. But it
21 really doesn't emphasize much or focus or describe very much
22 about multiple conspires so on balance I think the defense's
23 instruction is fairer. And given the nature of the facts in
24 this case, I think it's appropriate. I'm actually trying to
25 pull it up now.

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1 I'll hear from the Government who obviously
2 objects to that.

3 MR. HEEREN: Yes, your Honor.

4 First, looking at it big picture we just think
5 that the instruction you've given previously shorter is just
6 more clear. Judge Sand is good but he's not perfect, and
7 some of his instructions are less clear than others. And I
8 think this is a good example of one that is hardly a model
9 of clarity.

10 We have some particular, going to the particulars,
11 the biggest difference between the two and it my mind is
12 that the Court's instructions prior instructions makes more
13 clear that changes in the personnel as well as the
14 difference in timing of the personnel in terms of people
15 coming and going at different times is much more clear in
16 the Court's instruction.

17 And where the biggest problem with is in the
18 instruction in the portion of the Sand instruction, the
19 fifth paragraph, you have it where it says, So long as you
20 find that some of the co-conspirators continued to act for
21 the entire duration of the conspiracy for the purposes
22 charged in the indictment.

23 Respectfully, I think that's wrong.
24 Conspiracies -- it's not wrong. I want to be clear, it's
25 not wrong in that the defense did not misquote anything, I'm

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1 not criticizing them. It's in Sand but -- and I looked to
2 see if there is any explanation in the notes and it's not --
3 there's none. And I think it's a misstatement because you
4 can conceive of conspiracies where the same conspiracy
5 continues even though different players in the conspiracy
6 change.

7 So if you have a leader of a conspiracy and a new
8 leader takes over at the same time, but at different points
9 in time different members change you could you have what
10 looks like at a time moment in time a whole new set of
11 personnel but it's the same conspiracy as long as it's
12 continuous and as long as you can show the ongoing nature of
13 the purpose or goal of the conspiracy.

14 So if we're going to use relevant defendant's
15 proposal, I would propose strike the so long as you find
16 language at the end because I think it's inaccurate. I
17 would also propose that the next sentence instead of saying
18 that the members are not always identical, we would use the
19 Court's language which was, excuse me, let me find it again.
20 I think it's is we have a similar language. May change I
21 think is what I would say instead of the fact that the
22 members of the conspiracy may change instead of not always
23 identical. So those are our two primary concerns with it.
24 But by and large, we just think it's too wordy and leads to
25 more confusion than clarity.

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1 THE COURT: It's interesting because a lot of the
2 language is the same, I mean, between the two instructions.
3 In fact, if you look at the proposed Sand instruction, the
4 two paragraphs after the introductory paragraphs summarizing
5 the parties' arguments I think are the same. The third
6 paragraph, sorry, the fourth paragraph of the instruction,
7 however, I think is not in the one that I've used before.
8 And I actually think that's an important concept for the
9 jury to understand that if they find there's proof of
10 several separate and independent conspiracies, that's not
11 proof of a significant one. Unless one of the conspiracies
12 proved is the single conspiracy. I think that that is
13 something that should be included. I don't disagree with
14 you although I actually am not sure whether or not you have
15 to have at least one co-conspirator who continues to factor
16 entire duration of the conspiracy.

17 I guess it is possible that you could have a
18 conspiracy, the object of which is identical but entirely
19 new players or new conspirators.

20 MR. HEEREN: So the reason why I think that why I
21 would argue that we know that it be true is because
22 conspiracies can be proven with not only unindicted but
23 unidentified conspirators, right. So you have circumstances
24 in the Blumenthal case, one of the two major hub-and-spoke
25 cases is the perfect example of that. You have this case

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1 involving people essentially violating liquor controls
2 during World War II and they charge the different liquor
3 sellers and those individuals did not know, ultimately, who
4 they were purchasing it from above. There was a front
5 company but it was stipulated the front company wasn't it.
6 It was unknown. And the Court held it was still a
7 conspiracy a hub-and-spoke conspiracy because they had the
8 ring around it, right, they had the same objective.

9 So I think the point is if you can't even tell who
10 is at the center of the conspiracy then why must -- how
11 could it be the case that you have to find that the same
12 person acted for the duration you have to.

13 THE COURT: Mr. Lustberg, do you have any thoughts
14 on this?

15 MR. LUSTBERG: So I actually don't have any
16 particular thoughts on that specific issue. I honestly
17 don't know the law on whether there has to be at least one
18 person who is there for the entire time.

19 Certainly, I mean, both of those instructions
20 convey the idea that personnel may change and you know we
21 don't I think that's correct. I just don't -- I literally
22 don't know. I think the Sand instruction is very clear.
23 And as the Court said, I think it's -- I like the fact that
24 it really emphasizes the charge, the comparison between the
25 proof and what was charge the which is I think the key to

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1 this instruction.

2 As far as that one question of whether there needs
3 to be some continuity beginning to end I apologize, your
4 Honor I just haven't done that legal research.

5 THE COURT: I don't know the answer either and I
6 don't know if we need to resolve it because I don't think
7 the theory of this case depends on that in that the
8 Government is going to argue, I assume, that there were
9 consistent players at the hub of this conspiracy. So I
10 think it's best just to not include that language because I,
11 too, doubt whether or not that's an entirely accurate
12 statement of law. But, in any event, I don't think it's
13 necessary to instruct the jury on that here and risk
14 misstating the law.

15 My inclination is actually to go with the version
16 proposed by the defense, remove that language, though, about
17 the conspirators or at least one conspiracy having to act
18 for the entire duration for the reasons that I just said and
19 I think was there another comment by the Government about
20 the defense's proposed instruction.

21 MR. HEEREN: Yes, I think it's not as significant.
22 But the next sentence are not always identical. We would
23 propose maybe change instead of are not always identical.
24 The idea that not always identical implies that it normally
25 should be identical and I think that's wrong, too. Most of

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1 the time, conspires are not always identical, they're often
2 shifting. So "may change" is a much more neutral phrasing.

3 MR. LUSTBERG: That's fine.

4 THE COURT: Which paragraph is that in of the
5 proposed one?

6 I see it.

7 MR. HEEREN: Paragraph 5, last sentence.

8 THE COURT: Okay. The fact of the members of a
9 conspiracy may change.

10 Is that what you want to do?

11 MR. HEEREN: Yes.

12 THE COURT: Does not necessarily imply the rest of
13 that sentence.

14 MR. HEEREN: Correct, your Honor.

15 THE COURT: Okay. So we will adopt the
16 Mr. McMahon's version of multiple conspiracies instruction
17 and insert it right after the withdrawal section and before
18 we get to the actual discussion of the counts themselves
19 with the two changes we discussed. So the "so long" section
20 of the first sentence of the fifth paragraph will be removed
21 and then the last sentence will be changed to include "may
22 change" as opposed to "are not always identical."

23 Now, moving on to Count One, that's the first
24 substantive discussion of the law.

25 Any comments on objections? We're on Page 29 of

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1 the transaction.

2 MR. HEEREN: Just a typo, your Honor right after,
3 sorry, one second, your Honor.

4 On Page 30, the first paragraph after the block
5 quote. I think it says, the last sentence says, "I will
6 next instruction you," it should say "instruct."

7 THE COURT: Okay. Sounds good.

8 MR. HEEREN: And now the important stuff. We
9 don't have another one until Count Two.

10 THE COURT: Anything before that from the defense?

11 MR. LUSTBERG: No, your Honor.

12 THE COURT: Okay. So Count Two, what page?

13 MR. HEEREN: Page 32.

14 THE COURT: All right.

15 MR. HEEREN: And it's in the listing of the
16 elements. It's in the fourth element.

17 THE COURT: Yes.

18 MR. HEEREN: I don't think -- I would propose
19 striking the "as an agent for the Government or an official
20 of China" portion of the fourth element. It should just
21 read: "The defendant acted at least in part while in the
22 United States."

23 I don't feel particularly strongly about it I
24 think it's confusing because the jury has already been
25 instructed that element one is the defendant acted as an

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1 agent of a foreign government or official. And the fourth
2 element just makes clear that that acting had to be done at
3 least in part while in the United States.

4 THE COURT: Yes, that makes sense. I think we
5 took this directly from what you folks proposed, right?

6 MR. HEEREN: If we did, then that's may fault so I
7 take the blame there.

8 MR. GOLDBERGER: Your Honor, if I may?

9 THE COURT: Yes.

10 MR. GOLDBERGER: I'm not sure that there's any
11 evidence in the case at all about my client acting on behalf
12 of a foreign government. The only evidence in the case is
13 that there were conversations with Chen by both Kuang and my
14 client.

15 THE COURT: Okay. But that's going to be your
16 argument to the jury. This is talking about the what the
17 instructions are.

18 MR. GOLDBERGER: We don't get to the instructions
19 if there's no count against them. What I'm saying to the
20 Court is that how can there be -- they don't have any
21 evidence, the Government, of the fact that our clients were
22 acting in any way, shape, or form on behalf of the Chinese
23 Government. They were acting on behalf of Mr. Chen for sure
24 based on the conversations.

25 (Continued on the next page.)

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1 (Continuing)

2 THE COURT: So, that would be the basis for a motion
3 for a directed verdict, but I have not heard you make one
4 until now. I think that's what you're intimating.

5 However, there was evidence of the note itself,
6 which the Government will argue would have given someone who
7 wasn't consciously avoiding the truth that it was the
8 Government who was after Mr. Zhu, the John Doe victim, because
9 the note said, "Come back to China and serve ten years and
10 your family will be fine."

11 MR. GOLDBERGER: The testimony from both -- well,
12 certainly from Mr. Kuang, who spoke to Mr. Chen, was that this
13 direction as to what should be done was based on a dailo or
14 some gangster theory.

15 THE COURT: Right.

16 MR. GOLDBERGER: The Government has never -- the
17 Government of China has never, ever, ever, as far as I can
18 tell reviewing the case, been mentioned as the source of
19 wanting to have anything done.

20 THE COURT: So Mr. Goldberger, I'm going to
21 interpret your comments now as being impromptu Rule 29, if I'm
22 not mistaken, motion for a directed verdict after -- before
23 the jury gets the case. I will reserve on it, but I do think
24 at this point the jury -- the case should go forward.

25 I do think there's some evidence certainly from

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1 which a jury could conclude that Mr. Zheng knew or consciously
2 avoided the reality that he was acting on behalf of the
3 Chinese government; primarily, because of the nature of the
4 note and what it said.

5 So, you can obviously renew that objection after the
6 verdict depending on what it is, but that's how I'm going to
7 interpret your statement now.

8 That, however, has nothing to do with the
9 instruction I give to the jury as to which the Government is
10 suggesting for Count Two that we simply remove the somewhat
11 redundant and potentially confusing language in the fourth
12 element which repeats what's required for the first element.

13 So, let me hear from Mr. Lustberg or anyone else who
14 wants, Mr. Tung or Mr. Goldberger, if you want to comment on
15 that.

16 MR. LUSTBERG: Your Honor, I think, first of all, I
17 was also remiss in not moving under Rule 29, even
18 understanding that Courts always do reserve.

19 THE COURT: Right. And understanding now that you
20 don't have to --

21 MR. LUSTBERG: I understand.

22 THE COURT: You don't have to preserve it by making
23 it before, as used to be the case. So, you obviously can
24 still make a motion after the verdict.

25 So, let's go back --

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1 MR. LUSTBERG: Yes, to this issue, your Honor, I
2 actually think the Government's suggestion is a little bit --
3 makes it a little bit more confusing because -- so, the
4 language. It says, "Fourth, the Defendant acted, at least in
5 part, as an agent for the government or an official of China
6 while in the United States."

7 The Government, I think, is proposing...

8 THE COURT: Taking out the part where it says --

9 MR. LUSTBERG: "As agent."

10 But an element that the Defendant acted while in the
11 United States, it doesn't mean anything. I mean, it can be --
12 does that mean if you have lunch in the United States, that
13 that's enough?

14 It has to be tied. The actions have to be tied to
15 the offense at issue. And that's the reason why this language
16 exists.

17 So, I would oppose deleting that language. I get
18 that it's redundant, but I think that the actions in the
19 United States at issue have to be in connection with this
20 offense.

21 THE COURT: I am inclined to leave it in as well.

22 I think that simply to say "acted" without any
23 connection to the first element or the primary essence of the
24 crime would be -- could be confusing. So, I think that as it
25 is it's a proper statement of the requirement.

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1 And if the jury is confused because it repeats the
2 requirement that they had find that the person acted as an
3 agent of a foreign government, then perhaps they should acquit
4 because they still have to find that and they also have to
5 find that that conduct occurred while in the United States or
6 that those actions occurred while in the U.S.

7 So, I'm going to leave it as is.

8 MR. HEEREN: Yes, your Honor.

9 THE COURT: What else?

10 MR. HEEREN: The next proposal is at the end. It
11 would be to insert a sentence at the end of the last paragraph
12 on Page 32. So, right after the sentence that ends "other
13 compensation be received."

14 THE COURT: Yes.

15 MR. HEEREN: And the new sentence would be, "The
16 agreement may be established either by direct contact between
17 the agent and foreign government or indirect contact through
18 an intermediary or intermediaries."

19 THE COURT: Let me repeat it for my law clerk. The
20 agreement may be established either by direct --

21 Actually, do you have realtime in front of you?

22 THE LAW CLERK: Yes.

23 THE COURT: So you can see it.

24 -- either by direct contact between the agent and
25 foreign government or indirect contact through an intermediary

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1 or intermediaries.

2 I know that when the Government submitted its
3 original proposed charges, they included language to the
4 effect that the agency relationship could be through an
5 intermediary.

6 Does the defense have an objection to that language?

7 I didn't include it originally because I was a
8 little concerned about the lack of case law on this issue.
9 But let me say as a common sense proposition, it strikes me as
10 straightforward enough.

11 Mr. Lustberg, go ahead.

12 MR. LUSTBERG: Your Honor, I'm puzzled by it because
13 this is a case where the Government has this big board up
14 there with everybody's pictures and their titles, which are
15 government titles. So, I don't think there's a basis for
16 arguing that there even are intermediaries.

17 And I think that there's the danger that this
18 lightens the burden of proof. It seems to be arguing that
19 there can be some lesser relationship with the government.
20 I'm not sure that it matters because the argument, certainly
21 with respect to my client, would have to do with direct
22 contact with Chinese officials.

23 So, I'm not really sure I'm following what the basis
24 of that is or why it should be...

25 THE COURT: It seems clear to me that the

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1 Government's theory is that your client had contact with Zhu
2 Feng, but that Zhu Feng was not an official of the Chinese
3 government but rather was an intermediary between the Chinese
4 government and your client.

5 MR. LUSTBERG: But the case they put in also
6 includes contacts between my client and the guy who is called
7 Eric Yan, who is the lead defendant in the caption of this
8 case. So, it's not -- their theory was not limited to --

9 THE COURT: Be that as it may, the question really
10 is -- obviously, the Government can argue either or both
11 theories of acting as an agent for a foreign government, but
12 the question really is, is it the law?

13 And I'll acknowledge that I think Judge Cogan wrote
14 a decision that suggests that normal agency principles or U.S.
15 common law agency principles shouldn't necessarily be grafted
16 on to this FARA statute because it's unique. I do think,
17 however, that it makes sense if the FARA statute is going to
18 have any enforceability or impact or meaning, that a person
19 could still be liable if they aren't acting directly with a
20 Chinese official, because, likely, the Chinese official isn't
21 going to come here and directly or I shouldn't say -- isn't
22 always going to directly communicate with the person who is
23 carrying out the acts in the U.S., but it makes sense for the
24 enforceability for the statute and to achieve its purpose that
25 intermediaries used by the Chinese government so long as the

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1 person who carries out the acts knows or believes they are
2 working for the Chinese government ultimately would suffice.

3 So, I'm coming at it from the point of view of based
4 on the legislative history of this statute and what it was
5 intended to accomplish, it seems to me a logical reading is
6 the one the Government proposes, notwithstanding what Judge
7 Cogan said in his decision about not wholesale applying agency
8 principles to the statute.

9 I don't know if he specifically had this issue in
10 mind, but I'm just acknowledging that there's a dearth of case
11 law on this issue and that one decision by Judge Cogan could
12 be read to undermine the Government's argument, but I don't
13 feel that it does.

14 So, putting aside, Mr. Lustberg, what the Government
15 is going to argue, and I think it could encompass both
16 theories, both a direct connection to Eric Yan, who is an
17 official, and indirect contact to, for example, Tu Lan, who is
18 another government official but who was working through I
19 think Eric Zhu?

20 No, what was his first name?

21 MR. LUSTBERG: Johnny.

22 THE COURT: Johnny Zhu?

23 MR. HEEREN: Zhu Feng, yes, your Honor.

24 THE COURT: The question is should they be allowed
25 to argue both, and I think they should. So, I want to hear

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1 the counterargument to that.

2 And include this language in order to facilitate or
3 explain that argument; not explain, but provide a legal basis
4 for that argument.

5 MR. LUSTBERG: I don't have anything.

6 THE COURT: All right. I'm going to include this
7 additional sentence, recognizing that, as I said before, the
8 case law is undeveloped in this area.

9 And quite honestly, the Second Circuit could
10 disagree, but ultimately it would be helpful if there was some
11 decision on this issue.

12 MR. HEEREN: So your Honor, to give you just a
13 little comfort -- I don't want to argue a point I've already
14 won.

15 THE COURT: Right, exactly.

16 MR. HEEREN: So, I'm happy to be quiet if you prefer
17 me to.

18 THE COURT: Go ahead, make the record for powers
19 above us.

20 MR. HEEREN: So, first just a tiny clarifying point.
21 Section 951 and FARA are different statutes.

22 THE COURT: Right.

23 MR. HEEREN: So, we're dealing with Section 951.

24 And in the context of Section 951, there is actually
25 substantial case law that indirect relationships are

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1 sufficient. The primary modern one is, of course, *Rafiekian*,
2 991 F. 3d 529 from the Fourth Circuit, which explicitly held
3 that the relationship can be, quote, established by direct
4 contact or via an intermediary, and that's where we get our
5 language from.

6 But that's not the only decision. In *United States*
7 *v. Chung*, 659 F. 3d 815 in the Ninth Circuit, the Defendant
8 was convicted while he worked for a business, Boeing, and
9 passed information indirectly to the Chinese Government.

10 And perhaps most relevant, though actually old, and
11 I think that the Courts happen to forget it, there's actually
12 80-year-old precedent in this very circuit on this exact
13 issue. *United States v. Heime*, a Judge Hand decision from
14 1945. It's 151 F. 2d 813. That interpreted the predecessor
15 statute, 22 U.S.C. 233, which was materially identical on this
16 point. And in that case, the Court affirmed the conviction of
17 a man who was indirectly receiving requests from the German
18 Government through a German automotive company.

19 So, I understand the Court's point about the Circuit
20 has not really ruled squarely on the modern statute, but I do
21 think that the body of law is -- while not as robust as some
22 of the other common statutes, there is a real body here that
23 supports it, in addition to, as your Honor pointed out, sort
24 of both the legislative history and sort of the common sense
25 interpretation of how it should be applied.

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1 THE COURT: I'm aware that the proposed instruction
2 from the Government on this agency issue was largely drawn
3 from the jury charge in *Abouammo*, which was a Northern
4 District of California case, that, in turn incorporates the
5 Fourth Circuit's decision in *Rafiekian*. So, I understand that
6 there is some authority, albeit perhaps indirect, on this
7 interpretation.

8 And like I said, to me, it makes perfect sense in
9 order to achieve the actual purposes of the statute and the
10 realities in which or given the realities in which these cases
11 are going to arise. So, I'm not particularly concerned about
12 including this one sentence, but, like I said, I think the
13 Circuit may well have a different view. I don't know.
14 Perhaps not. But it would be actually helpful to get some
15 guidance on this issue if it does arise or come up on appeal.

16 So, we will add that one other sentence to the
17 instruction for Count Two, the Section 951 instruction.

18 Anything else on Count Two?

19 MR. HEEREN: This should be welcome news, I think,
20 which is I think we can strike the entirety of the last
21 paragraph about the means of notification. Since the parties
22 have stipulated that no notification has been made, I think
23 there can be a simple sentence about that it's been stipulated
24 to.

25 The way we have it phrased, though I think we're not

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1 beholden to the language, is, "As to the notification
2 required, the parties have stipulated that none of the
3 Defendants nor the alleged co-conspirators have notified the
4 Attorney General related to the alleged conduct in this case."

5 MR. LUSTBERG: No objection.

6 THE COURT: All right. No objection to that, so
7 we'll adopt that language.

8 Any objection, Mr. Goldberger or Mr. Tung?

9 MR. GOLDBERGER: No, your Honor.

10 MR. TUNG: No, your Honor.

11 THE COURT: Anything else with respect to Count Two
12 from anyone?

13 MR. LUSTBERG: No.

14 THE COURT: Now moving on to Count Three, anything
15 about Count Three? Or Count Four?

16 MR. HEEREN: The only thing, your Honor, is I think
17 it would make sense in the instruction at this point to name
18 the victims. They have obviously appeared by their true names
19 in court at this point and I think it would reduce any
20 confusion.

21 THE COURT: All right. So, we'll substitute the
22 John and Jane Doe references with their real names.

23 MR. HEEREN: Yes. And just so that everybody has
24 it, John Doe 1 is Xu Jin, Jane Doe 1 is Liu Fang, and Jane Doe
25 2 is Xinzi Xu.

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1 THE COURT: And her name is formulated in --

2 MR. HEEREN: Sorry, it's not, it's --

3 THE COURT: Xu Xinzi.

4 MR. HEEREN: It should be, yes, thank you.

5 THE COURT: And Liu Fang is L-I-U F-A and not

6 F-E-N-G, right?

7 MS. ARFA: It's "A."

8 THE COURT: So, we'll substitute all those.

9 MR. HEEREN: And I think because they've heard her
10 name as "Sabrina" also, if we could include also known as
11 Sabrina Xu for Jane Doe 2.

12 THE COURT: Okay.

13 Now, are you suggesting, though, that we change the
14 language in the indictment or just in the surrounding language
15 in the instruction?

16 And I'm looking at Page 34, for example.

17 MR. HEEREN: I think both. I don't believe --
18 obviously, if there's an objection to changing the indictment,
19 we'll more carefully consider it, but I think if there's no
20 objection from the Defendants that it's appropriate to make a
21 trial indictment for something limited, like replacing a name
22 like this.

23 THE COURT: Well, we can put in the real names in
24 brackets instead of the John and Jane Doe. I just wasn't sure
25 what you were requesting.

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1 MR. HEEREN: Yes, I think it's in both places.

2 THE COURT: Does the defense have any objection, and
3 I can't imagine you would, that we bracket in the real names
4 when we recite the charges in the indictment for Counts Three
5 and Four?

6 MR. LUSTBERG: No, your Honor.

7 MR. GOLDBERGER: No, your Honor.

8 MR. TUNG: No, your Honor.

9 THE COURT: So we'll do that as well.

10 Anything else with respect to Counts Three and Four
11 from the Government?

12 MR. HEEREN: Yes, your Honor. Page 36 in the
13 elements, the second element, we have a couple of additions.

14 So, second, that the Defendant traveled in
15 interstate and we would add "or foreign" commerce with the
16 intent to harass, and then we would add "or intimidate."

17 And then the sentence continues or place under
18 surveillance with adding the word "the" intent to harass or
19 intimidate.

20 And I think that was an error in the Government's
21 original instructions.

22 THE COURT: I'm not sure the "the" is an error,
23 but...

24 MR. HEEREN: Fair enough.

25 THE COURT: That's just a word preference.

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1 So, it seems to me correct that the statute
2 prohibits traveling -- travel in interstate or foreign
3 commerce.

4 Any objection to those additions?

5 MR. LUSTBERG: No, your Honor.

6 MR. GOLDBERGER: No, your Honor.

7 MR. TUNG: No, your Honor.

8 THE COURT: And then we'll make the other change,
9 "harass or intimidate, or place under surveillance with --"
10 I'm going to leave it with "intent" without "the."

11 Does anyone care?

12 MR. HEEREN: No, your Honor.

13 MR. LUSTBERG: I like it better with the "the."

14 THE COURT: You guys like the "the"?

15 MR. LUSTBERG: I do.

16 THE COURT: So, we'll put in "the." That seems to
17 be the vote. The "the" will be inserted.

18 MR. LUSTBERG: The most significant area of
19 agreement between me and Mr. Heeren all trial.

20 THE COURT: Right.

21 And we'll substitute the names throughout, the real
22 names of the victims.

23 MR. HEEREN: Our next one is in Page 37, the last
24 paragraph on that page.

25 THE COURT: Okay.

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1 MR. HEEREN: We would propose breaking that single
2 sentence into two sentences because those are two separate
3 definitions under the statute.

4 And, so, the way we would change it is that it would
5 be, "The term 'immediate family member' means a spouse,
6 parent, brother, sister, child, or ward. The term also
7 includes," and then "any other person" and the remainder of
8 the sentence.

9 And for what it's worth, we propose that because
10 when you put them together, it could be read to mean spouse,
11 parent, brother, sister, child, et cetera, dot, dot, dot, that
12 lives in the household, and that's not accurate.

13 THE COURT: Right. And that's why it can't be part
14 of one sentence even if you insert that "or" before ward, is
15 your position.

16 MR. HEEREN: I think it creates the risk of
17 confusion, yes.

18 THE COURT: Any objection to that?

19 MR. LUSTBERG: No, your Honor.

20 MR. GOLDBERGER: No, your Honor.

21 MR. TUNG: No, your Honor.

22 THE COURT: So the term also includes "any other
23 person."

24 Anything from the defense on any of the charges
25 themselves?

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1 MR. LUSTBERG: Nothing further from Mr. McMahon.

2 MR. GOLDBERGER: No, your Honor.

3 MR. TUNG: No.

4 THE COURT: Anything else relating to the closing
5 instructions?

6 MR. HEEREN: Nothing from the Government, your
7 Honor.

8 MR. LUSTBERG: Nothing from the defense.

9 MR. GOLDBERGER: Nothing from the defense, your
10 Honor.

11 MR. TUNG: Nothing.

12 THE COURT: Good. So, I think we're done with the
13 changes to the jury charges. We will post a track change and
14 a clean version of the jury instructions on the docket so you
15 can review those before tomorrow. And obviously, if we've
16 made any mistakes or there are any issues to still address,
17 we'll address those at nine tomorrow.

18 Now, the verdict sheet, any comments, objections, or
19 suggestions with respect to the verdict sheet?

20 MR. LUSTBERG: I'll provide my standard objection to
21 having "guilty" come before "not guilty," given the burden of
22 proof and presumption of innocence.

23 THE COURT: You know, it's funny. In the last trial
24 I had, that came up for the first time. And I don't have any
25 problem inverting it.

Charge Conference

1931

1 Does the Government?

2 MR. HEEREN: No, your Honor.

3 THE COURT: So, we'll invert to "not guilty and
4 guilty."

5 MR. HEEREN: The Government's only proposal would
6 be, and I don't know if this is possible, but if we could get
7 the last defendant for Count Two on the same page.

8 THE COURT: That's fine. Strangely, I thought of
9 that too. I was trying to decide if that really bothered me
10 enough.

11 But we'll do that.

12 MR. HEEREN: That was it.

13 THE COURT: Does everyone else understand? We'll
14 put a page break after Count One.

15 And then we may have to play with Count Four, which
16 I assume will be bumped to the next page.

17 That's it?

18 Good. So, we'll invert those and make sure all the
19 counts have all the Defendants on the same page.

20 We'll see you tomorrow morning at nine, everyone.
21 Thank you very much.

22 (A chorus of thank yous.)

23

24 (Matter adjourned until Wednesday, June 14, 2023, at
25 9 o'clock a.m.)

I N D E X

WITNESS

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